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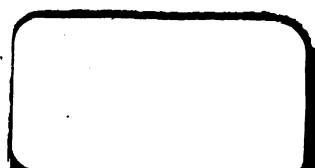
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BS. 4<sup>to</sup> 104.







*R Honble*  
*Henry Dundas.*

THE  
**HEDAYA, OR GUIDE;**

A  
COMMENTARY  
ON THE  
MUSSULMAN LAWS:

TRANSLATED BY ORDER OF THE  
GOVERNOR-GENERAL AND COUNCIL  
OF  
BENGAL,

BY  
CHARLES HAMILTON.

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VOL. IV.

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OF THE

F O U R T H V O L U M E.

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# T R A N S L A T I O N

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## H E D A R A;

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### C O M M E N T A R Y

ON THE

## M U S S U L M A N L A W S.

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### B O O K XXXIX.

#### Of *KISSMAT*, or *PARTITION*\*.

Chap. I.     Introductory.

Chap. II.    Of Things which are fit Objects of Partition.

Chap. III.   Of the Mode of accomplishing Partition.

\* Partition, in the *Mussulman* law, applies to joint property in whatsoever manner obtained or acquired. It more immediately relates, indeed, to the distribution of inheritance: but as the *Mussulman* doctors make no distinction, in terms, between a *partner* and a *partnerer*, (co-inheritance being defined to be one mode of partnership, Vol. II. p. 269.) the translator uses the terms *partner* and *partnership* throughout.

VOL. IV.

B

Chap.



Chap. IV.      Of Pleas of Error in Partition; and of Claims of  
Right in regard to it.

Chap. V.      Of the Laws of *Mahàyat*.

## C H A P. I.

Partition involves a *separation*, in articles of weight or measurement of capacity,

THE partition of things held in joint property is lawful and valid; because the prophet was accustomed to make a partition of plunder and hereditaments; and it is moreover a practice which no one pretends to controvert. It is to be observed, however, that partition may be received in two senses; for, considered in one view, it is a *separation*, as it separates or distinguishes the right of one man from that of another; and considered in another view it is an *exchange*; because, the share or portion which falls to *one* of the parties in consequence of the partition is partly his own original right; but part of it was the right of the *other* during their joint property; and this he receives in lieu of that part of his own right, which remains involved in the other's share. It is more particularly a *separation* with respect to articles of weight or measurement of capacity, such as wheat or silver, because of the similitude of their parts; for as these articles do not differ in their properties, the end to be answered by one parcel of wheat or silver being just the same as by another, (since there is nothing in the one that was not in the other,) it follows that each person receives his entire right, and nothing is left in the share of the one which of right belongs to the other;—whence it is that one partner may lawfully take his share during the absence of the other; and also, that if two men make a joint purchase of any article of weight or measurement of capacity, and afterwards divide it, each may

may separately sell the share which falls to him for a determinate profit on half the original price. It is, on the other hand, more particularly an *exchange* with respect to articles dissimilar in their parts or unities, such as animals or household goods;—whence it is that one of two partners in such articles cannot lawfully take his share in the absence of the other; and also, that if two men buy any thing of this species, and afterwards make a division, they cannot separately sell their respective shares at a determinate profit on half the original cost. Here, however, if those articles be all of one particular species, such as a herd of goats, the *Kázee*, at the requisition of only *one* of the partners, must enforce a partition; for the properties of all the goats being nearly the same, such a partition is, in effect, only a *separation*;—and the intention of such a requisition being, that the partner who makes it may enjoy the use of his own share solely, without any other person being able to interfere in his property, it is incumbent on the *Kázee* to comply with his requisition. Where, on the contrary, the joint property consists of articles of different species, the *Kázee* must not enforce a partition, as it cannot be made equitably where each particular thing differs from the rest in its properties.—If, however, both the partners consent to a partition of things of various species, it is lawful.

and an *exchange*, in articles of dissimilar parts or unities.

It is incumbent on the *Kázee* to appoint a person to make partitions, and to settle on him an allowance from the public treasury, so as that partitions may be made for the people without his receiving any hire; because, as the making of partitions is a part of the duty of the *Kázee* himself, (it being necessary in order to terminate disputes,) the allowances of the person appointed for this purpose must be defrayed from the public treasury, in the same manner as those of the *Kázee*; and also because, as the appointment of a person to make the partition is a benefit which extends to all *Mussulmans*, the charge of his maintenance must be defrayed from the public treasury, which is the property of all. If it be not in the power of the *Kázee* to settle

The magistrate must appoint a public partitioner; and must appoint him a salary,

or establish a particular

rate of hire  
for his work.

the allowance from the public treasury, he must at all events appoint a person who will make the partition for a certain rate of hire, to be paid by the parties who are concerned and particularly benefitted by the division. In this case, the rate must be moderate and fixed, so that the partitioner may not be able to make exorbitant demands.—It is, however, more eligible that his allowances be paid from the public treasury, as this is easier for the people in general, and precludes, in a greater degree, the imputations of corruption and injustice.

The partitioner must be just, and skilful;

THE partitioner must be a man noted for justice and integrity; and he must also possess a knowledge of that particular business.

but must not always be the same person.

THE magistrate must not compel the people always to accept of one particular person for their partitioner; because the transaction which passes betwixt the partners and the partitioner is a species of contract; and it is not lawful to compel any person to enter into a contract;—and also, because, if such a practice were admitted, the person possessing the exclusive appointment would demand an immoderate rate of hire.

The partners may agree to a partition, procuring (if one be an infant) an order from the magistrate.

It is lawful for several partners to agree amongst themselves, and to make a division of their joint property. But if there be an *infant* among them, it is requisite that they procure an order from the magistrate; for they possess no power over the infant.

One public partitioner cannot be concerned with another.

THE *Kâzee* must not suffer the persons employed in making partitions to be concerned together in the hire or profit arising from their business, such a conjunction tending to raise the hire to an exorbitant rate; for each of them, when applied to, will make some excuse for declining the employment, and they will refer the party who has occasion for their services from one to another, until at length he be constrained to consent to immoderate terms;—whereas, if every

every man is concerned only for himself, each will readily consent to be employed for a moderate hire, rather than lose it altogether.

THE rate of wages to a partitioner is regulated by the number of persons for whom the division is made, according to *Haneefa*. The two disciples maintain that it is determined in proportion to their respective shares, the wages of the partitioner being on account of their property, and therefore determined according to its extent, like the wages of a public weigher, of a measurer, or of a person who digs a well to be held in joint property,—or like the maintenance of a slave belonging to several partners. The argument of *Haneefa* is, that the wages of the partitioner are given to him for discriminating and separating the shares, in doing which it signifies not whether the shares be large or small, since the share of the inferior partner is distinguished and severed by his work, as well as that of him who holds a large proportion. It moreover sometimes happens that the labour in calculating a *small* share is more than in ascertaining a *large* share; and sometimes the reverse: hence it is difficult to determine how far the one or the other is attended with the most trouble; and therefore the hire must be referred to the mere act of *dividing off* or *discriminating*. It is otherwise in *digging a well*; for, in that instance, the wages are on account of digging and carrying away the earth, in which there is difference in the labour performed for each partner's proportion. With respect to *weighing* or *measuring*, if those be performed in order to effect a partition of any thing, (such as *wheat* held in partnership,) it is affirmed by some that the same difference of opinion subsists betwixt *Haneefa* and the two disciples:—but if they be performed merely to ascertain the quantity of the whole, or for any other purpose than partition, the wages are then on account of the weighing or measuring, which is greater in the larger than in the smaller share. There is also another opinion maintained upon the authority of *Haneefa*,—that the hire of the partitioner falls entirely upon the one who solicits the partition, and not

The partitioner is paid in proportion to the number of claimants.



not on the one who has not solicited it, because of its being advantageous to the one, but not to the other.

In the distribution of hereditaments, the magistrate must previously ascertain the circumstances:

but not if the property consist of moveables;

nor in the case of property acquired by purchase;

WHEN several co-partners appear before the *Kázee*, and represent that a tenement or piece of ground which is in their possession has devolved to them as the heirs of a certain person, the *Kázee* must not make a partition of the house or ground until they have proved by witnesses the death of the person, and the number of his heirs. This is according to *Haneefa*. The two disciples say that if they all concur, the *Kázee* may make the partition, taking care, however, to insert in the *Kiſſmat Námma*, or deed of partition, that it was made in consequence of their declarations. If, on the contrary, the joint property be *moveables* and not *lands* or *tenements*, and the parties represent that it is their inheritance, the *Kázee* may, on their representation, order the partition; or, if the joint property be lands or tenements, and they represent that they acquired it by *purchase*, the *Kázee* may order a partition. The argument of the two disciples is, that possession is an apparent proof of property, and the concurrent declaration of all the parties with respect to their several claims is a proof of their veracity. Besides, there is no person who either disputes or denies their allegations; and where there is no denier the LAW requires no evidence. Hence the *Kázee* must order the partition in the instance above-mentioned, as well as in cases which relate to moveable property acquired by inheritance, or landed property acquired by purchase. It is requisite, however, that he specify, in the deed of partition, that it has been made in consequence of their declarations, in order that his decree may extend only to those who have attended, and not to others who may (perhaps) afterwards appear. The argument of *Haneefa* is, that the order which the *Kázee* gives for the partition is in fact a decree against the defunct, by which his right is terminated; for until a partition take place, the hereditaments are still considered as his estate, inasmuch that if any increase be produced upon it, such increase is subject to the will of the deceased declared

clared in his testament, or is appropriated to the payment of his debts, neither of which could be the case after partition has been made. The partition, therefore, being in fact a decree of the *Kázee* affecting the defunct, the concurrence of a part of the claimants to the suits of the others is not admitted as an argument of sufficient weight; and hence they must support their claims against the defunct by evidence; in which case a part of the heirs are considered as litigants on behalf of the defunct.

OBJECTION.—A part of the heirs cannot be considered as litigants on behalf of the defunct, since each individual acknowledges the claims of the others, and a man who acknowledges another's claim cannot be regarded as his opponent.

REPLY.—A part of the heirs may be considered as litigants on behalf of the defunct, although they do acknowledge the claims of the others, their acknowledgment being of no weight;—in the same manner as where a man sues for a debt against an estate, and an heir or executor acknowledges his claim, in which case such acknowledgment, as being to the detriment of the others, is not sufficient, but the claimant must produce evidence before the *Kázee* in his suit, even against that heir or executor, before he can establish his claim against the estate in general to the prejudice of the whole of the heirs. The acknowledgment of the heir or executor being therefore of no weight, he may, with propriety, be considered as an opponent or litigant.

—What is here mentioned is the law with respect to *immoveable* property\*. It is otherwise with respect to *moveable* property†; because that requires care in keeping, and there is an advantage arising from the immediate partition of it; whereas *immoveable* property, being by its nature safe, requires no care:—besides, the person in whose

\* Arab. *Akkâr*; meaning *houses, tenements, &c.* such as is termed, in our law, *real* property.

† Arab. *Mankool*; comprehending every species of *personal* property.

possession

possession moveable property remains is responsible for it; whereas (according to *Haneefa*), he is not so with regard to *immoveable* property. It is also otherwise with respect to landed property acquired by *purchase*; because an article sold is no longer accounted the property of the feller, although it still remain undivided; and the partition of it, therefore, cannot be regarded as a decree of the *Kázee*, passed against an absent person, by which his right is terminated.

nor in case of a partition being demanded without the parties specifying the manner in which the joint property was acquired.

If the joint owners of a property request a partition of it, without specifying whether it was acquired by inheritance, or by purchase, or by any other means, the *Kázee* may order the partition, this being, in fact, not a decree against another person, since no other is acknowledged by them. The author of this work says, that this adjudication is to be found in the *Kitáb al Kiffmat* \*.—It is mentioned in the *Jama Sagheer* that when two men apply for a partition of lands which they prove by witnesses to be in their possession, the *Kázee* must not order the partition until they also prove, by evidence, that the lands are their property; for otherwise it is possible that they may belong to another person. Some say that this is agreeable to the opinion of *Haneefa* alone:—but others aver that it is agreeable to the opinion of all the learned; and this is approved, since it is unnecessary to order the partition of landed property in order to preserve it. Besides, the right of property being the ground on which partition is made, it cannot take place until that right be established by evidence.

A partition may be granted on the requisition and testimony of any two heirs; but an agent or guardian must be ap-

WHERE two heirs appear, and produce evidence to prove the death of their ancestor, and the number of his heirs, and the house or other inheritance is in their possession, but one of the heirs is absent,—in this case the *Kázee* may order a partition, if the heirs who attend require it, appointing an agent to take possession of the portion of the absentee; or if, under the same circumstances, one of the

\* A collection of laws compiled by *Mohammed*, the disciple of *Haneefa*.

heirs

heirs be an infant, the *Kāzee* may order a partition, appointing a *guardian* to take possession of his portion ;—because, in so doing, the interest of the infant or absentee is promoted.—(But here likewise the production of evidence is indispensable, according to *Haneefa*, in opposition to the opinion of the two disciples, as before stated.) It would be otherwise if they had become proprietors of the house by *purchase* ; for in that case no partition could be made in the absence of any of the partners. This distinction between the case of property acquired by inheritance and property acquired by purchase is made on the following grounds.—An heir is master of his ancestor's estate as his substitute, inasmuch that he has the power of returning (on discovering a defect) any thing which his ancestor may have bought, or, in like manner, he may be compelled (on the discovery of a defect) to take back any thing which his ancestor may have sold ; and he is likewise subject to become *deceived* \* in consequence of the purchases of his ancestor ;—(that is to say, if the ancestor purchase a female slave and die, and the heir afterwards have a son by her, and the slave then prove the property of another person, the son born of her is free, but the heir must pay the value of him to the proprietor of the slave, and he may again recover it from the person who sold the slave, in the same manner as if he were the ancestor who made the purchase.) One of the heirs, therefore, stands as litigant on behalf of the ancestor, and the other is litigant on his *own* behalf ; and the partition, under such circumstances, is in fact a decree passed in the presence of both the parties. The purchaser, on the contrary, becomes the proprietor of the thing bought by a recent title of property, and not in the manner of a substitute, inasmuch that he cannot, on discovering a defect, return the article to the person from whom the late seller had before bought it. Hence neither of the two present purchasers can stand as litigant on behalf of an absentee. Thus there is an evident difference between the two cases.

\* Arab. *Magroor*. The meaning of this term has been fully explained elsewhere.

and it cannot be granted where the property, or any part of it, is held by an *absent* heir, or his trustee, or an infant.

If the land \*, or a part of it, be in the possession of the absent heir, or of his trustee, or in that of an infant heir, the partition must not be ordered, whether the heirs who are present produce the evidence or not. This is approved; for the partition, in such a case, would in fact be a decree of the *Kázee* against an absentee, or an infant, divesting them of something they possess without any litigant appearing on their behalf;—nor can the trustee of the absentee stand as litigant on his behalf in any thing which may be attended with loss to him;—and it is illegal in the *Kázee* to pass a decree without all the litigants being present.

If only *one* heir appear, a partition must not be ordered, although he produce the necessary evidence, for it is requisite that both the litigants be present; and one man cannot stand as litigant on both sides. It is otherwise where two appear, as has been already shewn.

The partition may be ordered although one of the requiring parties be an *infant*, or, one an infant heir, and the other a legatee.

If two heirs appear, one an adult, and the other an infant, the *Kázee* must appoint a guardian to the infant, and order the partition as soon as evidence is produced; and in the same manner, if an adult heir appear, and also a legatee of one third of the estate, and they demand a partition, and produce evidence (one to prove that he is heir, and the other that he is legatee,) the *Kázee* must order the partition; for in each of these cases the litigating parties are both supposed to appear,—the adult heir being litigant on the part of the deceased, and the legatee on his own behalf,—and, in the same manner, the guardian being litigant on behalf of the infant,—whence it may be said that the infant (as it were) has appeared in his own proper person as an adult, because of the guardian being his substitute.

\* Arab. *Akkār*; meaning *any* immoveable property; (and in this sense is the term *land* to be understood throughout.)

C H A P. II.

Of Things which are fit Objects of Partition.

WHERE the respective share of each of the partners is capable of being separately converted to use, if any one of them demand a partition it must be granted; because partition is an indisputable right, when required in any article capable of partition, as has been before explained. If, on the contrary, the share of one partner only be fit for use, and not that of the other, because of its being extremely small, and the owner of the greater share demand a partition, the *Kāzee* must grant it; but he must not grant it at the requisition of the other partner; for as the former can reap a benefit from his share, his demand is worthy of regard; but as the latter can have no other motives for his requisition than malice, and a desire of giving trouble, it is not to be attended to. *Khafsf* holds the reverse of this doctrine, "because (says he) the *great* partner, in making his demand, occasions an injury to another, whereas the *small* partner, in making his demand, submits to his own injury."—*Hākim Shaheed*, on the other hand, mentions, in his abridgment, that "the *Kāzee* must order the partition at the request of either of the partners; for the great partner is desirous of enjoying the use of his share, and the small partner voluntarily submits to his own injury." The first of these opinions, however, is the most authentic.

An estate may be distributed on the requisition of any one partner, whose share separately is capable of being converted to use.

IF the shares of each of the partners be so very small that they would separately be of no use, the *Kāzee* must not order a partition unless both partners acquiesce; for whenever partition is compulsory

If the shares be separately useless, the assent of all the parties is requisite.

sively made, it is with a view to promote utility; but, in the present instance, all utility would be destroyed by it, and therefore it cannot take place without the consent of both the partners, as they must necessarily be the best judges in a matter which concerns themselves, and the *Kázee* can only be guided by appearances.

A partition must be ordered where the property consists of articles of one species, (not being land or money;)

WHEN the joint property is *Arooz*\*, (that is, neither *dirms*, *deemars*, *lands*, or *boufes*,) the *Kázee* must order the partition, provided it [the property in question] be all of one species, such as articles of weight or measurement of capacity, or similars of tale, or gold, silver, iron or copper, or *cattle* of one species, whether camels, oxen, or goats; for as, in this case, there can be no difference in the design, the partition may be effected with equity, and utility may thereby be accomplished.

but not where it consists of various species,

THE *Kázee* must not order a partition when the joint property is of various species, such as a camel and a goat, or a house and an ass; because, as articles of different species cannot be indiscriminately blended, the partition, in this instance, would not be a *separation and distinction*, but rather an *exchange*, which must always be effected by a mutual concurrence of the parties, not by the decree of a magistrate.

or of household vessels.

A partition may be made of cloth of an equal quality;

THE *Kázee* must not order a partition of household vessels, as those are subject to the rule of diversity of species, because of difference of workmanship. He may make a partition of *Herat* cloths, as those are all of one quality; but he must not make it of a single piece of cloth which is not uniformly alike throughout, for the division of one piece of cloth occasions an injury, as it cannot be effected without cutting it; neither must he make a partition of two pieces of cloth where they are of unequal value. It is otherwise where there are three

\* Some lexicographers define *Arooz* to signify household furniture. (*Soorâj-al-Loghât*).

pieces,

pieces, the value of one of which is equal to that of the other two; or where the value of one of them is one *dirm*, that of another one *dirm* and a quarter, and that of the third one *dirm* and three quarters; for, in the first case, he must give one piece to the one partner, and the other two to the other partner; and, in the second case, he must give to one of the partners the second piece, valued at one *dirm* and a quarter; to the other the third piece, valued at one *dirm* and three quarters, and must leave the first still to be held in partnership, one fourth appropriated to one partner, and three fourths to the other, as it is lawful to divide a *part* of a joint property, and to leave a part undivided.

HANEEFA is of opinion that slaves and jewels must not be divided by the *Kâzee*, because of the great difference which is to be found amongst them. The two disciples hold, that he may make a division of slaves, for this reason, that they are of one species, like camels, or goats, or captives taken in war. The argument of *Haneefa* is, that among the individuals of the human species there is a wide difference, because of their various characteristics; and hence slaves are, in effect, of *different* kinds. It is otherwise among animals, for with them there is little difference to be found betwixt the individuals of the same genus; and although the male and female of the human race be held as different species, yet the male and female amongst animals are reckoned as the same species. It is also different with respect to slaves taken in war, as it is in their *value* that the captors hold a right, whence it is lawful for the Sultan to sell them and make a division of the price; whereas, in a case of *partnership*, the right of the partners is connected with the *substance* of the article, as well as with the property it involves. Hence there is a difference betwixt plunder and partnership property.—Some are of opinion that jewels cannot be divided when they are of different species, such as pearls and rubies. Others say, that where the jewels are of *large* grains they cannot be divided, because of the great difference that may be betwixt them; but



but that when the grains are small, the difference being inconsiderable, the jewels may be divided. Others, again, maintain that no jewels, whether of small or large grains, can be divided, because the difference betwixt them, and the difficulty of ascertaining their value, is greater than in the case of slaves, inasmuch that if a man marry a woman, and in general terms stipulate to give pearls or rubies as her dower, such stipulation is invalid;—whereas, if he stipulate, in general terms, to give *slaves*, it is valid. The *Kázee*, therefore, is not to exert his authority in making a partition of jewels.

Partition cannot be made of a *báth*, mill, or well, without the consent of all the parties.

THE *Kázee* must not order the partition of a joint mill, bath, or well, unless with the concurrence of all the partners; (and such also is the rule with respect to a wall which stands betwixt two houses;) for if, in these cases, a partition were to take place, it would be injurious to all parties, as the individual share of each would then be useless.

Partition of houses and tenements.

It is proper to remark, that a single roofed place, surrounded with walls, with a door or entry, is termed a *Bait*, or *room*. A *Manzil*, or tenement, on the contrary, is a place composed of different rooms, a roofed court \*, and a kitchen, such as a man may reside in with his family. A *Dár*, or house, on the other hand, is a place consisting of various rooms or tenements, with an *open* court. A tenement is therefore superior to a room and inferior to a house. These are the definitions of *Shims-al-Ayma* in his book on *Sbaffa*. In this work, whenever the general word *Khanna* [house] is used, we mean such an one as we have now described, under the denomination of *Dár*, excepting only where we mention an *under* house in contradistinction to an *upper* house, and then we only mean a *Bait* or a *Manzil*.

\* Arab. *Sahn*; meaning the interior square of a dwelling, common to all the family, and which, in large edifices, is open, but in small ones is covered in.

IF there be several houses held in partnership or coparcenary in one city, each house must be separately divided according to *Haneefa*. The two disciples say, that if it be expedient for the partners the whole of the houses must be united in one general partition, and not divided separately. All the houses, therefore, must be considered merely as one house, consisting of various apartments, and all the shares of each partner must consequently concentrate in one of the houses, so that it may be his entirely. The same difference of opinion also subsists regarding the case of lands held in partnership or coparcenary, and dispersed in different situations. The argument of the two disciples is, that all the houses are, on the one hand, of *one* species with respect to name, appearance, and original design; as, on the other hand, they are of *different* species with regard to their particular qualities, and their commodiousness for habitation, which depends on size, and so forth; whence it must be left to the *Kázee* to determine their different degrees of superiority.—The argument of *Haneefa* is, that regard should be paid only to what they are in reality, with respect to their qualities; and that in them they may greatly differ on account of the difference of the cities, lanes, or neighbourhood, in which they are situated, and their proximity to or distance from water or a mosque; and that therefore it is impossible to observe an equality in the partition without dividing each house separately;—whence it is that a man cannot appoint an agent to purchase a *house* in general terms;—and so likewise, that if a man marry, assigning as a dower “*a house*,” (in general terms) his mention of the house is invalid,—in the same manner as holds where a man assigns “*cloths*” (generally) as a dower, or appoints an agent to purchase “*cloths*.”—It is otherwise with respect to a single house, held in partnership or coparcenary, composed of different rooms; for as, in such case, to divide each room amongst the co-partners would be productive of inconveniency to all, the whole house is therefore divided at once.

WHEN two houses, held in partnership, are situated in different towns, we learn from *Hillal* that it is the concurrent opinion of

*Haneefa* and *Aboo Yoosaf* that both houses shall be divided separately. *Mohammed*, on the contrary, maintains that they must be divided at once, as well as the houses situated in the same town.

Rooms, whether situated all in the same quarter, or in different quarters, must be divided at once, for the difference amongst them is inconsiderable. *Manàzil Molàziká* (that is to say, adjoining tenements, or such as are in the same house, one part of them being contiguous to another,) are considered as rooms; whereas, *Manàzil Mot-bàyená* (which is the term used for apartments not adjoining, in contradistinction to the other,) are considered as *houses*,—a *Manzil* or tenement being the middle term betwixt a house and a room, and resembling both.

If there be a partnership in immoveable property of two species, such as in a house and a piece of ground, or in a house and a shop, the *Kázee* must divide each separately, they being of different species.

### C H A P. III.

#### Of the Mode of accomplishing Partition.

The partitioner must draw a *plan*; and must make the distribution equitably by measurement or appraisement.

Partition of *houses* how accomplished.

It is incumbent upon the partitioner to draw on paper a plan of the thing which he divides, so that it may remain on his memory.—He must likewise observe an equality in the partition, that is to say, he must divide the article into due proportions; and it is also recorded that he ought to separate each share and measure it, so that its extent may be known. He must, moreover, *appraise* the article, as it is requisite, for his further guidance, that the value be ascertained. Supposing the article to be a *house*, in separating the shares he must also separate

the road and the drain belonging to it, if possible, so that one share may no longer have any connection with the other, in order that every cause of dispute may be terminated, and that the intention of partition may be completely accomplished. In doing this he must term one share the *first* share, that which lies next to it the *second*, and that which lies next to it the *third* share, and so on; and he must then write down their names, and draw them like lots; and he that draws the first name gets the first share, he that draws the second gets the second share, and so on to the end. The article must, moreover, be divided into fractions equal to the smallest proportion; that is to say, if the smallest proportion held by any of the partners or coparceners be a third, the whole must be divided into three parts; or if the smallest proportion be a sixth, the whole must be divided into six parts; so that the division may be made accurately. Thus, if an estate is to be divided betwixt two heirs, the one being the son and the other the daughter, it must be divided into three shares, one termed the *first*, the next to it the *second*, and the next the *third*; and the partitioner is to write the names upon billets, and cause them to be drawn like lots; and if the *son's* name come up first, he gets the first share, and the one next to it, and the third goes to the daughter;—or, if the daughter's name come up first, she gets the first share, and the other two fall to the *son*.

THE drawing of lots is proposed in order to give satisfaction to the parties, and to prevent the partitioner from being influenced by partiality or favour. It is not, however, absolutely necessary; and if the partitioner chuse to appoint a particular share to each, it is valid; for the making the partition is an act of magistracy, and the authority of the partitioner must therefore be enforced.

THE partitioner, in making a division of landed property, must not annex a consideration in *dirms* or *deenars* without the concurrence of the parties; that is to say, if he make one share less than the

In the partition of landed property, a composition in money can-

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other,

not be admitted.

other, and, as a compensation, annex to it a sum in *dirms*, it is not valid, unless they consent;—for the partnership is not in *dirms*, and partition is one of the rights of the partnership. Besides, if *dirms* be admitted into the transaction, it destroys the equality of the partition; because one of the partners gets the property, and is liable for the *dirms* which have become the right of the other; and there is a possibility that he may never pay them, by which means the other would lose his right.

Partition of a house, with a piece of ground.

If the partnership property consist of two things, namely a house, and a piece of ground, each, according to *Abou Yoosaf*, must be divided separately, agreeably to its value; for it is only by ascertaining the value of each that an equality can be observed in the partition. It is recorded from *Haneefa* that the ground may be divided agreeably to its measurement, and afterwards he on whose share the house is situated, or whose share is the most eligible, must pay a sum in *dirms* to the other, so that an equality may be effected;—and that therefore *dirms* may be introduced as auxiliaries in the division when necessity requires it. *Mohammed* in this case maintains that the person on whose share the house is situated must give to the other partner a space of ground equal in value to it. If, however, his share (from its containing the house) be still the most valuable, and it be impossible for him to effect an equality for want of enough of ground to compensate for the value of his house, he may then give *dirms* equivalent to the excess; for as the necessity exists only in that degree, the original rule of *partition by measurement* must not in any greater degree be abandoned. This is conformable to the opinion delivered in the *Affil* [the *Mabsoot*].

Partition of land where there is a road or drain.

If the partitioner so divide the property, that the road or drain of one runs through the share of the other, and no condition had been expressed regarding this matter, the case then admits of two predicaments.—I. It is possible for him to turn the road or drain another way,

way, so that it pass not through the share of the other;—in which case the partition is valid;—for it is not proper that he let the road or drain of one man pass through the share of the other; on the contrary, it is incumbent on him to turn it another way, even though each individual may have mutually stipulated that they were to enjoy their respective shares “*with all the rights and immunities belonging to them*,” because the intention of *partition* is to separate and discriminate the proportions of each partner; and as it is possible, in the present instance, without injury to either, to effect such a separation and discrimination completely, so as that no connection or dependance may remain betwixt the shares, this is therefore indispensable.—It is otherwise with respect to lands sold with an express condition that “they are sold with their *immunities*,” for here, notwithstanding the connection or dependance which may subsist betwixt them and the lands of another, the intention of *selling*, which is to transfer the right of property, is nevertheless fully accomplished.—II. It is (or may be) impossible to turn the road or drain another way, so that it pass not through the share of the other:—and this may happen under two different circumstances:—FIRST, where the parties have not stipulated to one another the enjoyment of their shares “*with all the rights and immunities belonging to them*,”—in which case the partition must be annulled, on account of the connection and mixture of property, which renders it inefficient, the ends of partition (namely, separation and discrimination) not being thoroughly accomplished;—the partition must therefore, in this instance, be made anew, in such a manner, that the road and water-drain of each may be separate. (It is otherwise with respect to lands sold; for the object of a sale is to transfer the right of property, which the purchaser may fully possess without being able to enjoy immediately the use of it, whereas the intention of partition is that the use of the property may be enjoyed in the fullest degree, which it cannot be unless a separate road be made.)—SECONDLY, where all the parties have stipulated that they shall enjoy their respective shares *with all the rights and immunities belonging*

to them; in which case, the partition is valid, and the road and water-drain are included in it, since the end of partition is that each may enjoy the use of his property, and it is impossible perfectly to enjoy the use of the grounds without a road and water-drain. The road and water-drain are therefore, in this instance, included in the partition, provided the parties mutually stipulate to each other the enjoyment of their shares with all their respective rights: as, however, the object of partition is to *discriminate*, which requires a complete separation of all connection in their respective shares, the road and water-drain are not included, unless such a stipulation be particularly made. It is otherwise with respect to lands farmed; for the intention of *farming* being to enjoy the use of the lands, which cannot be done without having a road and water-drain, it follows that if these articles should not have been expressed, they are nevertheless included in the farm.

In case of a dispute concerning the road, it must be divided.

If the parties differ regarding the road, some of them desiring that it should remain, as formerly, in common, but that all the rest of the property be divided, and others of them opposing this, in such case, provided it be practicable, the magistrate must divide the road, and assign a part of it to each particular share;—or, if this be impracticable, he must leave the road out of the partition, which must nevertheless be made, in order that the parties may enjoy the full use of all their property excepting the road.

If the parties differ regarding the extent of the road, (that is, regarding the height and breadth which ought to belong to each) the *Kāzee* must regulate their proportions by the breadth and height of the doors of their respective houses, as that is sufficient to answer their necessary occasions. The advantage of this arrangement is, that if any of them be desirous of making a projection or terrace from his house over the street he may do it *above* the height of his door, but not *below* it; and the road will still remain in common, according to

to their several proportions, in the same manner as before the partition; for the partition (as we have observed above) did not take place regarding the *road*.

If two partners, in dividing a road, agree that the one shall have two thirds and the other only one third, such a partition is valid, although the house be held betwixt them in equal proportions; for in partition it is lawful to give more or less than his proportion to one partner, provided both of them agree to this.

The parties may make a private agreement with regard to it.

If two partners hold a house, the *upper* floor of which is held by a stranger, or which has no upper floor, and likewise another house, the under floor of which is held by a stranger, and also a complete house (that is, one of two stories), in this case the *Kāzee* must appraise each house separately, and make his division accordingly. *Mohammed* alleges that this is the only lawful mode. *Abou Yoosaf* and *Haneefa* are of opinion, that he ought to make the partition according to *measurement*. The argument of *Mohammed* is, that the lower floor has many advantages and conveniences which the upper floor cannot possess, such as wells, necessary houses, stables, and so forth; and that therefore the equality of partition cannot be effected but by an appraisement. The argument of the two disciples, on the other hand, is, that the partition, if possible, ought to be made by a measurement, since the partnership subsists in a thing capable of measurement, and not in the value of that thing. They afterwards, however, differed regarding the mode of measurement; *Haneefa* contending that one span of the lower floor should be held equivalent to two spans of the upper floor; and *Abou Yoosaf* maintaining that a span of the one is equivalent to a span of the other. Some have thought that the contradictory opinions of these three sages ought to be ascribed to their different places of abode, and the periods in which they lived; for during the time of *Haneefa* the inhabitants of *Koofo* (the place of his residence) preferred the under floor to the upper;

Complicated partition of different houses and tenements.



upper; whereas afterwards, in the time of *Abou Yoozaf*, the people of *Bagdad* (where he lived) held the upper and the under floor in equal estimation; and *Mohammed* observed that, on the contrary, the taste of mankind differed, some preferring the upper and some the under floor, and others holding them in equal estimation. There are again some who, instead of ascribing the opinions of the three sages to the prevailing customs and notions of the ages and places in which they lived, are rather for deriving the origin from different principles of law. Thus, in support of *Haneefa's* doctrine, it is argued, that the advantages of an under floor are double those of an upper one; for the advantages of the under floor remain after the upper one is ruined and destroyed, whereas those of the upper floor do not remain after the destruction of the under one. In the under floor, moreover, there are not only the advantages of *habitation*, but also those of *foundation*; for the proprietor of the under floor may build if he pleases, but the proprietor of the upper floor can only enjoy the advantages of habitation, as it is not lawful for him to erect any buildings without the consent of the proprietor of the ground floor; and upon these considerations a span of the under floor should be reckoned equivalent to two spans of the upper. In favour of *Abou Yoozaf's* opinion, on the other hand, it is alleged, that *habitation* is the great end of both, and that both are equally fit to answer that end; whence it is lawful for the proprietor of either of them to erect any buildings that are not productive of injury to the other. Lastly, it is urged, on the part of *Mohammed*, that the advantages of an upper and an under floor are according to the seasons of summer or winter, the violence of the wind, the temperature of the air, and the different climates or countries in which they are situated; whence it is impossible to establish any just rule of partition, but by appraisement. In modern times the law is administered agreeable to the adjudication of *Mohammed*, which does not require any comment or elucidation.—The mode of partition prescribed by the doctrine of *Haneefa*, in the case in question, is as follows.—The partitioner must first

first set against the upper floor house (which we shall suppose measures one hundred spans) a part of the complete house equal to thirty-three one-third spans; because an upper floor is rated at half the value of an under floor; consequently thirty-three and one-third spans of the under floor of the complete house are equal to sixty-six and two-thirds of the upper floored house; and as those sixty-six and two-thirds, together with the thirty-three and one-third spans of the under floor, form the complete house, the whole amount exactly to the one hundred spans of the upper floor house. The partitioner must then set sixty-six and two-thirds spans of the complete house against the under floor house (supposing it to measure one hundred spans), for the upper floor of the complete house is rated at only half the value of the under floor house, and sixty-six and two thirds spans of both the floors of the complete house are equal to the one hundred spans of the under floor house. The mode, on the other hand, of making the partition according to *Abou Yoozaf's* doctrine is as follows. Let one hundred spans of the upper floor house be set against fifty spans of the complete house; or, let one hundred spans of the under floor house be set against fifty spans of the complete house; for, according to him, the upper and the under floor are held in equal estimation; wherefore fifty spans of the complete house, comprehending fifty spans of the under floor, and fifty spans of upper floor, must be equal to one hundred spans.

If the partners differ after partition, one pleading that "he has not received the whole of his share, a part of it still remaining in the possession of the other,"—and the other denying this, and the two partitioners (or any other two persons,) testify that "they have made a partition," their evidence, according to the two disciples, must be admitted. *Mohammed* says that it cannot be admitted, because the evidence they give relates to their own act, and is consequently inadmissible, in the same manner as the evidence of a man relative to some act of his own, on the occurrence of which a person may have formerly

In disputes after partition, the evidence of two partitioners must be admitted,

formerly suspended the emancipation of his slave. The argument of the two disciples is, that the witnesses, in fact, testify to the act of *others*, (namely, the act of *seizing* and *possessing*,) and not to their own act; because their act was merely *discriminating* and *separating*, to which evidence is not required; hence their testimony must be admitted. *Tabávee* observes, that where the partitioners receive pay for making the partition, it is universally allowed that their evidence cannot be admitted; and indeed several doctors of our sect are of the same opinion; alleging that as, in that case, their evidence tends to prove that they have fully and accurately performed the work for which they received pay, it is in the nature of a representation on their own behalf. Our author, however, does not subscribe to this reasoning; for he remarks, that the two partitioners could not have a view to their own interest in their evidence, as the partners have agreed that they fully and accurately performed the work of partition for which they receive their pay, the only question in dispute being the *seizin* and *possession*; wherefore no imputation of falsehood ought to fall on them.—If only *one* partitioner give evidence, it must not be admitted; for the evidence of one man alone against another is not sufficient.

but not that  
of one parti-  
tioner.

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#### C H A P. IV.

### Of Pleas of Error in Partition; and of Claims of Right in regard to it.

A plea of error cannot be admitted, where the party ac-

WHERE one of the partners complains of an error in the partition, and that a part which ought to have fallen to him by the partition is in the possession of another, in this case, if he have before acknowledged

ledged that he had received his share, his complaint must not be admitted unless supported by evidence; for it is, in fact, suing to cancel the partition after it has been accomplished; and it is to be presumed that there is no error, and that his complaint is false. If the complainant cannot support it by evidence, the others must be required to deny the complaint upon oath; and if they refuse to swear, their refusal is construed as proof in favour of the complainant, and the *Káree* must cause their property to be divided anew, agreeably to their several proportions, as this is dealing with them according to their own suspicions. The author of this work thinks that in the above case the complainant's suit should, on account of his contradicting himself, be wholly rejected.

knowledges  
having re-  
ceived his  
share, unless  
it be sup-  
ported by  
evidence.

If the complainant allege that he *did* receive his whole right, but that the other afterwards took a part of it, the denial of the other, on oath, must be credited, as this is in fact a complaint of *usurpation*.

A complaint  
of after-  
assumption is  
a complaint  
of *usurpation*.

If he allege that "a certain village fell to him in consequence of the partition, but that the other had not delivered it up to him," in this case, provided he have not previously acknowledged the obtaining possession of his share, and the other contradict him, both must be required to swear;—because the dispute is with respect to the quantity which the complainant received in consequence of the partition; and hence the difference in the present instance is analogous to a dispute concerning the quantity of an article of sale,—in which case a mutual oath is tendered to the parties (as has been fully explained under the head of SALES;) and so here likewise.

In case of a  
complaint of  
non-delivery,  
both parties  
are sworn,  
and the par-  
tition is dis-  
solved and  
made anew.

If one of the parties complain that an *error* took place in the division, his complaint must not be attended to, it being held in the same light as a complaint of a fraudulent bargain, which in cases of *sales* concluded by the principals themselves cannot be heard. In partition, therefore, as in *sales*, since both parties have mutually con-

A plea of er-  
ror cannot be  
heard, if the  
partition was  
made by the  
parties.

curred, such a complaint cannot be heard. If, however, the partition was made by the order of the *Kázee*, and *extreme* fraud be alleged, the complaint must be heard, as the stability of the *Kázee's* authority depends on justice.

Case of a claim laid to a particular room in a house, after partition.

If a house be divided betwixt two partners, each receiving a part, and afterwards one of them claim a room in the possession of the other, alleging, that "it is one of the things which ought to have fallen to him in consequence of the partition," and the other deny this,—in this case, as the plaintiff complains of *usurpation*, it is requisite that he bring proper evidence; and if both bring evidence, that adduced on the part of the plaintiff, who is *not* in possession, must be admitted in preference to that of the other; for it is a maxim of the law that the evidence on the side of the party who is *out* of possession is preferable to that on the side of him who is *in* possession.

If the complaint above-mentioned be previous to an avowal of the plaintiff's having ever acquired possession, both parties must be required to swear, and the partition must be annulled, and performed anew. In the same manner, also, if two partners differ regarding their boundaries, the one alleging that "a certain boundary belongs to him, but has fallen into the possession of the other," and the other alleging the same thing regarding another boundary, and both produce evidence, the *Kázee* must decree, in favour of each, that boundary which is in the possession of the other. If only *one* produce evidence, the *Kázee* must pass a decree only in his favour; but if neither of them produce evidence, they must both be required to swear, in the same manner as in cases of sale.

S E C T I O N .

Of the Laws which prevail in a *Claim of Right* \*.

If a house (for instance) held in partnership be divided, and afterwards an undefined part of the whole, (such as a *half* or a *third*), prove the right of another, the partition, according to all our doctors, is null, and must be made anew.

In a case of claim set up to an indefinite part, after partition, it must be dissolved and made anew.

If a particular and defined part of what has fallen to one of the partners, in consequence of partition should prove the right of another person, the partition is valid, according to all our doctors, and becomes not void with respect to what remains after the right of the other person has been separated:—but the party from whose share that right is taken has it in his option either to dissolve the partition, (thereby restoring the property to the state in which it stood previous to the partition) and then to demand a new one,—or, if he chuse, he may let the partition hold good, and exact from his partner's share a compensation for that part of which he has been deprived by its proving the right of another.

If a *definite* part be claimed, after partition, it must be compensated for from the shares of the other partners, or, the partition must be dissolved and executed anew;

If, after partition, an undefined part of the share of one of the partners (such as an *half*), prove the right of another person, the partition is valid with respect to the remainder, and does not become void according to *Haneefa* and *Mohammed*; but the partner upon whose share the claim operates has it in his option to annul the partition;

and so likewise, if an *undefined* part be claimed.

\* Arab. *Isbiât*; meaning a claim set up to the subject of a deed or contract, by some person not concerned in such deed or contract.

(restoring the concern to the state in which it previously stood,) and then to demand a new partition;—or, if he chuse, he may let the partition hold good, and exact from his partner a compensation for the half of his share which he has lost, and which is equivalent to one fourth of the share in that partner's possession. According to *Abou Teofas*, the partition is in this case null, since by an undefined proportion of one of their shares proving the right of another person, a third partner is created, without whose concurrence the partition is void;—in the same manner as where an undefined part of the *whole article* proves the right of another person. The reason of this is, that where an undefined proportion of one of their shares becomes the right of another, one of the objects of partition (namely, *separation*) is destroyed, since the share of one of the partners by that means becomes in itself a matter of partnership; and he must have recourse to the share of the other for an undefined part, equal to that proportion of his right of which he has been deprived. It is otherwise in the preceding case, where a particular and defined part of one of their shares proves the right of another; for in that case the object of partition (namely, *separation*) still exists with respect to the remainder. The argument of *Haneefa* and *Mohammed* is, that the object of partition, namely separation, is not defeated by an undefined proportion of one of the partner's shares becoming the right of another person. Hence a partition of this nature, *originally* made, would be valid;—as where, for instance, the first half of a house is jointly held by two partners, *Zeyd* and *Amroo*, and by a third person, named *Kbàlid*, one half thereof by *Kbàlid*, and the other half betwixt *Zeyd* and *Amroo*; the second half being held jointly between *Zeyd* and *Amroo*, *Kbàlid* holding no share therein;—in which case *Zeyd* and *Amroo* might lawfully make a partition betwixt themselves, *Zeyd* getting the whole of their joint share in the first half of the house, and one-fourth of the second half; and *Amroo* getting three fourths of the second half; and it is in the same manner *ultimately* valid; the case becoming similar to that in which a *defined* proportion of one of the

## CHAP. IV. PARTITION.

shares proves the right of another. It is otherwise where an undefined proportion of the *whole* house, including *both* shares, proves the right of another; because, in this latter case, supposing the partition to be valid, an injury is sustained by the third person, whose right was manifested after the partition, since he must then accept his proportion, *not* in a *compact* manner, but *disperfed*, from the shares of each of the others; whereas, in the former case, (in which an undefined proportion of one of the shares proves the right of another,) he suffers no injury. Thus there is an evident difference between the two cases. In short, the nature of the case in question is this, that one of two partners takes one third of a house, and the other takes the remaining two thirds, the value of the first third being equal to that of the other two thirds; and afterwards one half of the first third proves the right of another person;—in which case, (according to *Haneefa* and *Mohammed*,) the first partner has it in his option to annul the partition; for if it continue valid, his share is defective, because of its being *disperfed*, part in the *first* third of the house, and part in the two *last* thirds;—or, if he please, he may take one fourth of the share which fell to the second partner; for if the *whole* of his [the first partner's] share had proved the right of a third person, he would have been entitled to take one half of the second partner's share; wherefore (arguing of a part from the whole) since one *half* of his share proved the right of the third person, he is entitled to take one half of an half of the second partner's share, which is equal to one fourth.

If the partner to whose lot the *first* half falls should *sell* a moiety of it, and afterwards the other moiety prove the right of another, he is still entitled to one fourth of the *second* half in the possession of his co-partner, for the reasons before assigned; and his option of annulling the partition drops, because of his having sold a part of his share. This is according to *Haneefa* and *Mohammed*. *Abóo Toosaf* maintains that the *second* half, in the possession of the co-partner,



er, must be divided equally betwixt them; and that the first partner forfeits to his co-partner one half of the price for which he sold a part of his share; for (agreeably to his tenets) the original partition is invalid; and as an article of which a person obtains possession by an invalid deed becomes his property, he may lawfully dispose of it by sale: but he is responsible for the value of it; and hence, in the case in question, the first partner is responsible for the value of an half of what he has sold, as that is a moiety of the other's half.

A debt proved against an estate, annuls the partition of it among the heirs,

If the estate of a deceased person be divided amongst the heirs, and afterwards a debt be proved against the estate *equal* to the whole, the partition must be annulled, because the debt prevents the estate from being the property of the heirs;—and the same rule holds where the debt is *not* equal, because the right of the creditor attaches equally to the whole fortune of the deceased. The partition must therefore be annulled, unless there be left after it a sum sufficient to discharge the debt, in which case it is not annulled, since the annulment of it is not necessary for the discharge of the debt.

unless the creditor remit it, or the heirs discharge it.

If the creditor, after the partition, remit the debt, or if the heirs discharge the debt from their own fortunes, the partition remains valid, whether the debt be equal to the estate or exceed it, the obstacle to its validity being thus removed.

An heir may prefer a claim upon an estate after partition.

If one of the heirs prefer a claim of debt against the deceased, after the partition of the hereditaments, his claim is admissible; for in this case there is no contradiction, since the debt relates to the *spirit* or *value*, and not to the *substance* of the particular hereditaments, and it was in the *substance* of the hereditaments that the partition took place.

A claim cannot be set up by an heir,

If a part of the heirs, after partition, prefer a claim for a particular thing, included in the estate, on whatever ground the claim be built,

built, it cannot be admitted, on account of the contradiction, which is here evident, as their acquiescence in the partition implies an acknowledgment in them that that particular thing, which has been divided, was a part of the co-parcenary.

to any particular article, after distribution.

## CHAP. V.

Of the Laws of *Mahāyat*.

MAHAYAT, in the language of the LAW, signifies, *the partition of usufruct*; and it is allowed; because it is frequently impossible for all the partners to enjoy together, and at one time, the use of the thing held in partnership. *Mahāyat*, therefore, resembles the partition of property (whence it is that the *Kāzee* may enforce it in the same manner,)—with this difference, however, that in the partition of property each partner enjoys the use of his respective share at the same time, whereas in the partition of usufruct each most frequently enjoys the use of the thing held in partnership only when it comes to his turn, by rotation. Partition of *property* is therefore more effectual than partition of *usufruct* in accomplishing the enjoyment of the use; for which reason, if one partner apply for a partition of property, and another for a partition of usufruct, the *Kāzee* must grant the request of the former; and if a partition of usufruct should have taken place with respect to a thing capable of a partition of property, (such as a house or a piece of ground,) and afterwards one of the partners apply for a partition of property, the *Kāzee* must grant a partition of property and annul the partition of usufruct.

*Mahāyat* is a partition of usufruct.

and is not annulled by the decease of the parties.

A PARTITION of usufruct is not annulled by the death of one of two partners, nor even by the death of both, for if it were annulled, it must (most probably) be renewed, (since the heirs of the deceased may lawfully demand a partition of usufruct,) and therefore it would be to no purpose to annul it.

Partners may make it by allotting to each the use of a particular part of the joint concern;

If two partners, by a mutual contract, make a partition of usufruct respecting a house, to this effect, that one of them shall inhabit one part of it and the other another,—or, that one shall inhabit the upper floor and the other the under, such contract is valid; for as a partition of property executed in this manner is lawful, so likewise is a partition of usufruct. It is proper to remark, that a partition of usufruct, when thus executed, is in reality a *séparation*, that is, a division of the whole of the shares of usufruct of one partner from those of another partner, and a concentration of both into one place: but the contract does not comprehend an *exchange*, whence it is that a limitation of time is not required in it;—for if it comprehended an exchange, a limitation of time would have been requisite, because of its being (in that case) a lease.

(in which case either is at liberty to let his share;)

It is lawful for each partner to let out on rent that part of which the usufruct has fallen to him, and he may appropriate to himself the rent accruing therefrom, whether it be a condition in the agreement of partition of usufruct or not; for every use which accrues from that part becomes (in consequence of the partition of usufruct) his property, and the rent which he receives is nothing more than a compensation given him in lieu of the use accruing from it.

or by stipulating an alternate right to the use.

If two partners make an agreement of partition of usufruct regarding a slave, in this manner, that the one day he shall serve the one, and the next the other, it is lawful; (and so likewise if they make a similar agreement regarding a small room;) for partition of usufruct is sometimes effected by means of time, and sometimes by means

means of place; and in the present instance it is effected by means of the *former*.

If two partners disagree concerning the terms of their contract of partition, the one alleging that it related to *time*, and the other that it related to *place*, the *Kázee* ought to enjoin them to agree regarding one or other of these methods. The reason of this is that the partition of usufruct with respect to *place* is the more *equitable*, since by that means each partner enjoys the use at the same time that the other partner enjoys it also; but partition of usufruct with respect to *time*, (on the other hand) is the more *complete in regard to the use*, since each individual then enjoys it entire. As, therefore, the reasons in favour of these two methods are different, it is requisite that the partners agree on one of them;—and if they chuse partition with respect to *time*, the *Kázee*, to prevent the imputation of partiality, must draw lots, in order to determine which of them shall have the first turn.

A difference between the parties must be settled by the interference of the *Kázee*.

If two partners (whom we shall suppose *Zeyd* and *Amroo*) make a partition of usufruct regarding two slaves, to this effect, that the one shall serve *Zeyd*, and the other *Amroo*, it is valid, according to the two disciples; for as (by their doctrine) partition of *property* with respect to slaves is lawful, whether performed by the authority of the *Kázee*, or by the mutual agreement of the parties, it follows that partition of *usufruct*, with respect to slaves, is also in the same manner lawful. Some (by inference from the doctrine of *Haneefa*) maintain that the *Kázee* must not *enforce* the partition of usufruct with respect to slaves; (and such is reported as his opinion by *Khafaf*;) because compulsion being (as we have formerly shewn) disallowed by *Haneefa* with respect to partition of *property* in the case of slaves, it evidently follows that the *Kázee* cannot enforce a partition of *usufruct* in a similar case. The truth is, that if the *Kázee* enforce a partition of *usufruct* in this way, it is lawful, according to *Haneefa*,—

Case of partition of the use of two slaves,

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whereas,

whereas, if he were in this way to enforce a partition of the *substance* it would be unlawful; because in the *service* of slaves there is no great difference, but in their *persons* they differ considerably.

If a partition of usufruct be made regarding the above two slaves in this manner, that the maintenance of the one whom *Zeyd* takes for his service shall be defrayed by *Zeyd*, and the maintenance of the one whom *Amroo* takes shall be defrayed by *Amroo*, it is valid, on a favourable construction. Analogy would suggest, that it is not valid, because the maintenance of each of the slaves is incumbent on both the masters;—but when it is stipulated that the maintenance of one of them shall fall solely on one of the masters, and that of the other on the other master, it may be called an *exchange*; and as the *consideration* (supposing it an *exchange*) is uncertain, it is therefore invalid. The reason for a more favourable construction, in this particular, is that in *feeding* slaves *strictness* is not particularly regarded. It were otherwise, however, if each partner stipulated to *clothe* his slave, as *strictness* is regarded with respect to *clothing* them.

or, of two  
houses,

If two partners make a partition of usufruct regarding two houses; in this manner, that the one shall inhabit the one house, and the other inhabit the other, it is valid: and the *Kāzee* may enforce it, according to the two disciples; and such is also the opinion of *Haneefa*, as mentioned in the *Zābir Rawāyet*. The reason of this, with the two disciples, is that as (agreeably to their tenets) a partition of *property*, made in this manner, is valid, so likewise is a partition of *usufruct*. Some say that according to *Haneefa* such a partition of usufruct, when made by the mutual agreement of the parties, is valid; but that it cannot be enforced by the *Kāzee*; for although a partition of *property* of this nature, by the consent of the parties, be valid, still (agreeably to his tenets) the *Kāzee* cannot enforce it; and the same of a partition of *usufruct*. There is another opinion transmitted to us from *Haneefa*, that a partition of usufruct in the manner above-mentioned.

mentioned is utterly invalid, whether enforced by the *Kāzee*, (for the reasons which have been stated above,) or made by mutual agreement; because it would be a sale of residence in one house for residence in another, which is not legal, as has been already shewn in treating of HIRE. It is otherwise with respect to partition of the *substance* of two houses; for the sale of a part of the one house for a part of the other is lawful. The reasons for the opinion quoted from the *Zāhir Rawāyet* are, that as the difference between the usufruct of the one and of the other is inconsiderable, a partition of the nature described is in the manner of a separation, and is therefore lawful when made by the mutual agreement of the parties, and may be enforced by the *Kāzee*. The difference, on the contrary, between the *substance* of the houses may be very considerable; hence a partition of the *substance* of them, in the manner described, is (in effect) an *exchange*, and may accordingly be made by the consent of the parties, but cannot be enforced by the *Kāzee*.

IF a partition of usufruct be made regarding two quadrupeds, to this effect, that the one partner shall have the riding of the one, and the other the riding of the other, it is not valid according to *Haneefa*. According to the two disciples it is valid; since a partition of property made in this manner is (by their doctrine) valid; and partition of usufruct is only a branch of partition of property. The argument of *Haneefa* is, that there is a difference in the use and riding of one or of another quadruped, because of the difference in riders, some being expert and knowing in the art of riding, and others the reverse. The same difference of opinion also obtains concerning a partition of usufruct, by rotation, with respect to *one* quadruped:—in opposition to a *slave*; for a slave serves according to his own reason, and will not suffer a greater burden than he is capable of bearing, whereas a quadruped must submit.

or, of *two*  
quadrupeds.

Partition of the advantage from a house may be effected by each party letting it to hire alternately,

If a partition be made regarding the produce of a house, to this effect, that the one partner shall let it out to rent for one or two months, and enjoy the produce or rent, and that afterwards the other partner shall let it out in the same manner, and enjoy the rent, such a partition is valid, according to the *Zâbir Rawâyat*: but a similar agreement regarding a slave or a quadruped is not valid. The reason of this distinction is, that in the case of the slave or quadruped the equality of the several shares, which is a necessary condition, is lost, — whereas in the case of the house it is preserved; for slaves and quadrupeds are changed and prejudiced by the lapse of time and severe labour, and it is probable that their hire will be less the second than it was the first turn, whereas a house may be supposed to continue in the same state during both turns, and the rent may be equal.

any occasional excess in the rent being divided equally between them.

If it should happen that the rent of a house is greater during the turn of one partner than in that of the other, they are both to participate in the excess, or difference betwixt the one rent and the other, so that an exact equality may be effected betwixt them. It is otherwise where they make a partition respecting the *use* of the house, and it afterwards yields a greater produce to the one in his turn than to the other, for as, in this case an equality has still been preserved in that which was the subject of partition, (namely, the *use*,) the excess of acquisition, received in return for the *use*, is immaterial, since it frequently happens that there are two things exactly equal, and yet the return received for the one is greater than that received for the other.

In a case of partition of the advantage from two houses, neither party is accountable for any excess of rent to the other.

A PARTITION concerning the rent of *two* houses is likewise lawful, according to the *Zâbir Rawâyet*, for the same reasons as have been assigned in the case of *one* house. If, however, one house yield a greater rent than the other, still the partners do not both share in the excess. The reason of this distinction is that, in the case of *two* houses, when a partition of their rents is made, *separation* is the prevailing

vailing principle; because as each partner enjoys the rent of his particular house, at the same time, it follows that each obtains the whole of his respective rights, without leaving any part of them with the other,—whereas in a partition of the usufruct of *one* house, the partners receive the rent by rotation, (that is, the one receives the rent the one month, and the other receives it the other,) and it may therefore be said that they successively grant to each other a *loan* of their shares of the rent,—the partner who holds the second month lending to him who holds the first month his share, or half of the rent for the *first* month, which he is again to receive out of the rent of the second month;—and it may be also said that during their respective months each acts as agent for the other in receiving his share; and when the other has received his share from the rent of the second month, if there be an excess, it is divided betwixt them; but if, on the contrary, he be not able to recover the whole amount of his loan from the rent of the second month, (it being less than the first,) the excess which is on the side of him who held the first month must be divided betwixt the partners, so that a perfect equality may be thus accomplished.

ACCORDING to the two disciples, a partition with respect to the *hire* of two slaves, made in the manner of the preceding case, is lawful, as well as a partition with respect to the *service* and *use* of two slaves. *Haneefa* maintaining that it is not valid; because the difference to be found in two slaves is greater than that which is to be found in *one* slave at two separate periods. As, moreover, a partition with respect to the gain required from a *single* slave, by rotation, is invalid, it follows that such a partition with respect to the gain acquired from *two* slaves is invalid *a fortiori*. Besides, a partition regarding the service and use of slaves is admitted from *necessity*, slaves being of themselves indivisible; but there is no *necessity* in the case of the *hire* of slaves, as that is a thing which is capable of division. In the case, moreover, of *service*, it may not be requisite to consider

Case of partition of the advantage from two slaves.



consider matters strictly;—whereas, in the case of *hire* (which is a *money* transaction) matters must be considered strictly. Hence there is no analogy between the cases.

A partition of advantage from two quadrupeds.

A PARTITION of usufruct concerning the hire of two quadrupeds is invalid, according to *Haneefa*, in opposition to the two disciples. The arguments used on both sides are the same as those which have been set forth in the case of a partition of usufruct concerning the use or service of a quadruped.

A partition of usufruct cannot be made with regard to *productive* articles.

If two partners make a partition of usufruct regarding an orchard of dates, or a garden containing trees, in this manner, that each shall take a part and cultivate it, and enjoy the fruits produced from it,—or, if they make a partition of usufruct regarding a herd of goats, in this manner, that each shall take a certain number, and feed them, and enjoy the milk produced by them, neither of these partitions of usufruct is valid; because partition of usufruct regarding *use*, as well as partition of usufruct regarding *service*, is admitted only from *necessity*, as being unsubstantial and therefore incapable of division; but, in the present instances, the fruit and the milk, when once produced, are capable of division, being things which substantially exist, and therefore there is in these instances no necessity. The device here is for one of the partners to sell his share to the other, who may first enjoy the fruit and milk, and afterwards, when the other's turn is expired, his partner may again purchase the whole, and enjoy the fruit and milk in his turn. Or, one may enjoy the produce of the other's share in the manner of a *loan*, and ascertain the quantity thereof, for the loan of indefinite things is lawful.

HEDAYA.

# H E D A Y A

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## B O O K XL.

### Of MOZÁREÁ, or COMPACTS of CULTIVATION.

**M**OZÁREÁ, in the language of the LAW, signifies a compact Definition of the term. betwixt two persons, one being a proprietor of land, and the other the cultivator, by which it is agreed that whatever is produced from the land shall belong to both in such proportions as may be therein determined.

A COMPACT of cultivation is not valid according to *Haneefa*. Difference of opinions concerning compacts of cultivation. The two disciples maintain it to be valid; because it is related of the prophet that he entered into such a compact with the people of *Kbee-bir*, by which it was agreed that they should manage the gardens and.

and lands of *Kbeebir*, and enjoy one half of the fruits and grain produced from them, and that they should give the other half to him. Besides, a compact of cultivation is, in fact, a compact of partnership in regard to stock and labour, in this way, that one of the parties being the proprietor of the ground, and the other the tiller of it, the product is between them.—It is therefore valid from its analogy to a contract of *Mozáribat*; for contracts of *Mozáribat* are valid on a principle of expediency; since, as it often happens that there are men possessed of property who have not a capacity for trade or business, and again, that there are others endowed with such a capacity who have no property, it is therefore convenient that a contract of *Mozáribat* be established betwixt them, by which means the desires of both are accomplished; and as the same reason subsists in the case of compacts of cultivation, they are therefore valid as well as compacts of *Mozáribat*. It is otherwise where one man gives to another goats, fowls, or silk worms, to take care of, on condition that he who thus takes care of them shall have one half of the produce and the proprietor the other half; for this is disapproved; because as the care and management of the keeper has no effect in creating the produce, partnership is therefore not sufficiently established in that instance. The arguments of *Haneefa* on this point are threefold. FIRST, The prophet has expressly prohibited *Mokháberá*, which in the dialect of *Medina* has the same signification as *Mozáribat*, namely, compacts of cultivation. SECONDLY, To make a compact of cultivation is to hire a labourer for a part of that thing which is produced by his labour: it is therefore, in effect, a *Kafeez Tehán*, and as that is unlawful, so likewise is this.—(*Tehán* signifies a miller or grinder of wheat, and *Kafeez* a cup used for measuring; *Kafeez Tehán* therefore means to hire a person to grind wheat into flour, in consideration of a measure of the flour for his hire.)—THIRDLY, The rate of hire, in such cases, is uncertain, when any produce is reaped; or it is annihilated when no produce is reaped; and in either case the hire is invalid. With respect, moreover, to the transaction which passed betwixt the prophet and the people

people of *Kbeebir*, it was not a compact of cultivation, but was rather in the nature of a tributary revenue, allowed to be paid in kind, as an indulgence or compromise. As compacts of cultivation are thus deemed invalid by *Haneefa*, it follows that, (agreeably to his doctrine,) where the labourer waters, tills, and sows the land, and it nevertheless proves unproductive, he is entitled to the customary rate of hire adequate to his labour, since (according to *Haneefa*) the compact of cultivation is, in effect, as an *invalid hire*. This is where the seed sown is furnished by the proprietor of the ground; for if the seed be furnished by the cultivator, he is liable for the rent of the land at the customary rate:—and if, in either case, any produce be reaped, it belongs to him who supplied the seed, since it is an increase from his property;—and the other, if he be the cultivator, is entitled to a rate of hire adequate to his labour,—or, if he be the proprietor of the ground, to an adequate rent for his ground. In the present times, however, the adjudication of the courts is given according to the doctrine of the two disciples, both because compacts of cultivation are convenient to mankind, and also because they have become every where customary.

THE following conditions are essential to the validity of a compact of cultivation. I. That the ground be capable of cultivation, for otherwise the object of the compact cannot be accomplished.—II. That the proprietor of the ground and the manager be both qualified to make such a compact; that is to say, that they be both in their right reason, of age, and conversant in such compacts; for unless the parties be so qualified no compact whatever is valid. III. That the period or term be expressed; for such a compact is in the nature of an agreement, either for the use of the *ground*, (as when the *cultivator* supplies the seed,) or, for the use of the *labour*, (as when the seed is supplied by the proprietor of the ground;) and the determinate use of either can be ascertained only by the period. IV. That it be expressly stipulated by whom the seed is to be supplied, in order

They require that the ground be capable of cultivation, that the parties be duly qualified,

that the term of their continuance be expressed,

that the party be specified who is to supply the seed,

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that

that the share  
of the *other*  
party be ex-  
pressed,

that the land  
be delivered  
up to the cul-  
turator,

that both  
parties parti-  
cipate in the  
produce,

and that the  
particular  
seeds be men-  
tioned.

Of compacts  
of cultivation  
four descrip-  
tions are va-  
lid,

that the grounds of the compact may be known;—in other words, in order that it may be known whether it is founded on the use of the *labour*, or on the use of the *land*, and that no source of dispute may remain. V. That the particular share which is to fall to him who does *not* supply the seeds be expressed; for in consequence of the agreement he is entitled to a share; and it is requisite that the proportion be determined, because a thing which is unknown cannot be established by the compact, notwithstanding a share be in general terms stipulated. VI. That the proprietor of the land deliver up the land to the cultivator, in order to the cultivation of it; and that he himself abstain from any management or enjoyment of it; inasmuch, that if it be stipulated in the compact of cultivation that he also shall manage, the compact is null, because of the invalidity of such stipulation. VII. That both parties participate in the produce of the ground after it is reaped; for a compact of cultivation is ultimately a compact of partnership; wherefore every stipulation repugnant to partnership invalidates the compact. (For example, if a precise quantity of the produce be stipulated for one of the parties, it is invalid; since, as it is uncertain whether so much will be produced, the partnership is therefore defeated.) VIII. That the particular species of seed, such as wheat, barley, &c. be expressed, in order that the species in which the hire of the labourer is to be paid may be known.

COMPACTS of cultivation, (according to the two disciples,) are of four different kinds:—I. Where the ground and the seed are supplied by the one, and the cattle, and the labour by the other:—and this is lawful, for the cattle are considered as implements of labour, and the case is therefore similar to that of a man hiring a taylor to sew his robe with his (the taylor's) own needle. II. Where the ground alone is supplied by one of the parties, and the labour, seed, and cattle by the other:—and this also is lawful; for in this case the labourer has hired the ground for a known proportion of its produce; and

and it is therefore lawful, in the same manner as if he had hired or rented it for a certain number of *dirms*. III. Where the ground, the seed, and the cattle, are supplied by the one, and the labour alone by the other:—and this likewise is lawful; for in this case the proprietor of the ground hires a labourer to work with implements belonging to him (the hirer); and it is consequently analogous to the case of a man hiring a taylor to sew his robe with his (the hirer's) needle,—or, to that of a man hiring a labourer to dig with his (the hirer's) hoe. IV. Where the ground and cattle are supplied by one of the parties, and the seed and labour by the other.—This is not valid, according to the *Zâhir Rawâyet*:—but it is reported from *Aboo Yoosaf* that this also is valid; for as, if it were agreed that both the cattle and the seeds should be supplied by the proprietor of the land, it would be valid, it is in the same manner valid where he supplies the cattle only; being, in fact, the same as where the cattle are furnished by the cultivator. The reasons on which the opinion in the *Zâhir Rawâyet* is grounded are, that the use of *cattle* is different in its nature from the use of *ground*; for the use of ground arises from a strength in the soil which occasions vegetation, whereas the use of cattle consists in their fitness for labour: these two things, therefore, not being of the same species, the use of the cattle cannot be a dependant on the use of the ground. It is otherwise where the cattle are supplied by the cultivator; for the use of cattle and the use of a cultivator or labourer are of the same species, the product being equally derived from the work of both.

*See p. 226. Confirmed.*

It is here proper to remark, that besides the four species of contracts of cultivation above enumerated, there are two more, which are, however, invalid. I. Where it is stipulated that the seed shall be supplied by one of the parties; and the ground, the labour, and the cattle, by the other; which is invalid, because the *sixth* condition before-mentioned is not found in it. II. Where it is stipulated that the seed and cattle shall be furnished by one of the parties, and the

and two are invalid.

ground and labour by the other, which is likewise invalid, for the same reason. In both these cases the produce of the land (according to the one opinion \*) belongs to him who supplied the seed, upon the same principle that it belongs to him in any other cases of compacts of cultivation which are invalid. But according to the other opinion †, the produce belongs to the proprietor of the land; and he therefore stands (as it were) as merely a *borrower* of the seed of which he has obtained possession by its being sown in his ground.

The period of their duration must be known, and the produce must be participated between the parties, in indefinite proportions.

COMPACTS of cultivation are not valid unless the period of their duration be known;—nor unless the produce of the land be indefinitely participated between the parties, (such as in a *third*, a *fourth*, &c.) in order that partnership may be established betwixt them. If, therefore, it be stipulated that either of them in particular shall receive a certain number of measures of grain from the produce of the ground, the compact is null, as in this case partnership is defeated, (in other words, is not established,) since it is possible that no more may be produced from the ground than what is thus stipulated to one of the parties;—and the case is therefore similar to that of two men concluding a contract of *Mozáribat*, in which it is stipulated that one of them shall receive a certain number of *dirms*.

See *2nd ed.* p. 49

In the same manner also, compacts of cultivation are invalid where it is stipulated that he who supplies the seed shall receive an equal quantity of grain from the produce of the ground, and that the rest shall be divided betwixt the parties;—for, in case the produce exceed the quantity of seed, a stipulation of this nature defeats the partnership with respect to that particular quantity; or, with respect to the *whole*, in case the produce should *not* exceed the quantity of the seed. A stipulation of this nature, moreover, is similar to where the parties

\* The opinion of *Hanefas*, as before stated.

† The opinion of the two disciples agree,

agree, regarding tribute-land, that the rest of the produce shall be divided after deducting the tribute. It is otherwise where two men agree that one tenth of the produce shall go to one of the parties, and that the remainder shall be divided betwixt both; for a stipulation of this nature does not defeat partnership, because the remaining nine-tenths still continue participated between the parties; whence this is similar to a stipulation, regarding tithe-lands, that "after deducting the tithe, the remainder shall be divided betwixt the parties."

IN the same manner also, a compact of cultivation is invalid if it stipulate that whatever is produced on a particular spot, (such as on the banks of a rivulet,) shall belong to one of the parties, and that the remainder of the produce of the whole ground shall be divided betwixt both; for such a stipulation defeats partnership, since it is possible, that nothing may be produced except upon that particular spot:—and it is in like manner invalid where it is stipulated that the produce of one spot of ground shall go to one of the parties, and the produce of another spot to the other.

IN the same manner also, a compact of cultivation is invalid where it is stipulated that the one shall get the straw, and the other the grain; for it is possible that nothing may be produced but straw: and it is equally invalid if it be stipulated that the straw shall become their joint property, and that the grain shall belong to one of them only; for here a partnership is not established with respect to the *grain*, which is the particular object of cultivation.

IF it be stipulated, in the compact of cultivation, that the grain shall be divided equally betwixt the parties, and no mention be made of the straw, still the compact is valid, because a partnership is stipulated in that thing which is the chief object of cultivation; and in this case the straw will belong to him who supplied the seeds, as of that

If the *grain* alone be mentioned, the straw goes to him who supplies the seed;



that the straw is the produce. (The *Shiekh*s of *Balkh*\* are of opinion that the straw should also be divided equally betwixt the parties; because such is the usual practice when no mention is made of the straw; and also because as the straw is subordinate to the grain, it should, as well as the grain, be held in partnership.)

and it may be stipulated to go to him; but it cannot be stipulated to go to the other.

IF it be stipulated that the grain shall be divided equally, and that the straw shall go to him who supplied the seed, it is valid; because this is consistent with the spirit of compacts of cultivation. If, on the contrary, it be stipulated that the straw shall go to him who did *not* supply the seed, it is invalid, as such a stipulation defeats the partnership in case nothing but straw should be produced. The difference betwixt these two cases is, that the person who did not supply the seed has no other claim to the straw than what he acquires from the stipulation, whereas he who supplied the seed has a right to the straw in consequence of its being the produce of his seed; and whether the straw be stipulated to him or not his right to it holds equally good.

The produce is participated according to agreement; and if *nothing* be produced, the cultivator has no claim.

WHEN a compact of cultivation is valid, the produce of the ground is the joint property of the parties, in such proportions as they may have stipulated, such as an half, a third, or the like.—If, on the contrary, nothing be produced, the cultivator is not entitled to any thing; for he has a right only to a share of what may be produced. It is otherwise where the compact of cultivation is invalid; for in that case an adequate hire falls due upon the *person* [of one of the parties,] not upon the *produce*; and the person is not absolved by a failure of produce.

Where the compact proves invalid,

WHEN a compact of cultivation proves invalid, the crop belongs to him who furnished the seed, it being the produce of his property:

\* *Balkh* is a city in *Turan*.

Besides,

Besides, the other has no right therein except what he acquires in virtue of express conditions in the compact; and where that proves invalid, it follows of course that the entire crop belongs to the person who supplied the feed.

lid, the produce goes to him who furnishes the feed; and the other party,

If the feed be supplied by the proprietor of the ground, the cultivator is entitled to a suitable hire for his labour, provided it do not exceed what he would have received in consequence of the conditions of the compact; because, in subscribing to these conditions, he consented to relinquish his right to the excess. This is the law, as laid down by the two elders. *Mohammed* maintains that he is entitled to a suitable hire, to whatever amount; for as the master of the land has obtained his services in consequence of an invalid compact, he is of course liable for the *value* thereof, *service* not being of the class of similars;—as has been fully explained in treating of *Hire*.

if he be the cultivator, gets wages (not exceeding his right under the compact;)

If the feed be supplied by the cultivator, the proprietor of the ground is to receive a suitable rent for his ground, whether there be any produce or not. The reason of this is, that as the cultivator has acquired the use of the ground in consequence of an invalid compact, he ought therefore to restore the use itself; but that being impossible, and there being no *similar* in which he might make a return, it is therefore incumbent that he make a return in the *value* to an amount not exceeding what the other would have received in virtue of the stipulations of the compact. This is the doctrine of the two elders. *Mohammed* is of opinion that he must pay an equivalent whatever it may be.

or, if the proprietor of the ground, an adequate rent,

If the cattle be provided by the proprietor of the ground, so as that the compact, (according to the *Zâbir Rawâyet*,) becomes invalid, the cultivator is in that case liable for a suitable hire on account both of the cattle and the ground;—and this is certainly just; since the cattle are equally included in the contract of hire, (the compact

(and also an adequate hire for the cattle, if supplied by him.)

of

of cultivation being, in fact, a contract of hire in this instance;) and the use of the cattle and the use of the ground are uses of different kinds.

If it be the proprietor who thus gets the produce, he may keep the whole; but if the cultivator, he must bestow the surplus in charity.

WHERE the proprietor of the ground, in consequence of having supplied the seed, is entitled to the produce, he may lawfully, on the compact proving invalid, enjoy the *whole*, since it was yielded from ground which was his own property. If, on the contrary, the *cultivator*, in consequence of having supplied the seed, be entitled to the produce, he is to reserve for his own use a quantity equal to the seed he supplied, and also a quantity equivalent to the rent he is to pay to the proprietor of the ground,—and the rest of the produce he must apply to charitable purposes; because the produce springs from the seed, but grows out of the ground, whence his right to the use of the ground is invalid; and as invalidity in regard to the use occasions a *bafeeness* in regard to the product, it follows that what remains with him as a *return* is lawful to him, and that every thing else must be bestowed in alms.

The party who agrees to supply the seed is at liberty to retract previous to the sowing.

WHERE two men enter into a compact of cultivation, and he who was to supply the seed afterwards retracts, previous to the sowing, the *Kázee* must not compel him to abide by the compact, because he cannot abide by it without sustaining an immediate loss from the sowing of his seed, and the case is therefore similar to where a man hires another to break down his house, in which instance, if the hirer were to retract, the *Kázee* could not compel him to abide by his agreement. If, on the contrary, the party retract who was *not* to supply the seed, the *Kázee* may compel him to fulfil the compact; for in so doing he does not sustain any loss; and compacts of cultivation, like compacts of hire, are binding, unless when some plea can be alleged sufficient to dissolve compacts of hire, in which case a compact of cultivation is also dissolved.

Is the proprietor of the ground, being to furnish the seed, should retract, after the cultivator has tilled the ground, the cultivator is not entitled to receive any thing for the work he has performed. Some, however, are of opinion, that although, in point of law, there be no compensation due to the cultivator, still, in point of conscience, it is incumbent on the proprietor of the ground to satisfy the cultivator for the work he has performed, as he has been *deceived* in this instance.

and if the proprietor of the ground thus retract, the cultivator is not entitled to any thing.

WHEN one of the parties dies, the compact of cultivation, like compacts of hire, becomes dissolved. (The reason of this is fully set forth in treating of *Hire*.)

The compact is annulled on the decease of either party.

If a man give up a piece of ground to another for a term of three years, and afterwards, when the first year's crop has begun to grow, but is still unfit for reaping, the man die, the ground, in this case, remains in the hands of the cultivator until the crop be fit for reaping, and the produce is then divided according to the conditions of the compact;—and the compact is dissolved with respect to the remaining two years of the term; because *analogy* would suggest that it continues even for the *first* year, as the duration of a compact depends on the duration of the parties; but it is continued throughout the *first* year, in order to the preservation of the rights of both parties, (that is, the cultivator and the heirs of the proprietor,) since, if it were to discontinue, the cultivator would sustain an injury. It is otherwise in regard to the *second* and *third* years, because in the discontinuance of the compact for those years no injury is sustained by the cultivator; and accordingly the compact is dissolved for those years, agreeably to analogy.

If the proprietor of the ground die, when the crop has appeared, the compact is dissolved at the end of that year;

If the proprietor of the ground die after the cultivator has ploughed the land, and dug rivulets for watering it, but previous to the crop appearing, the compact is dissolved, since in such case the

but if he die *before* that, it is dissolved immediately.

dissolution of it is not injurious to the cultivator's property. (It is otherwise where the proprietor of the ground dies after the crop has begun to grow, and appears like grass; for in that case the compact is not dissolved, as the cultivator would then be injured in his property by the dissolution of it.) In this case the cultivator is not entitled to any thing for his labour; because the use of a person's service cannot be appreciated but by a compact; and when the compact becomes null, the estimation of the service no longer remains.

The proprietor of the ground may dissolve the compacts with a view to sell the ground for the discharge of his debts;

but if the crop be growing, the sale must be delayed until it be ready for cutting.

It is lawful for the proprietor of the ground to dissolve the compact; in case he have occasion to sell the ground to discharge considerable debts which he may have incurred, for this is a pretext, which he may avail himself of, in the same manner as in *Hire*\*:—and in this case the cultivator has no right to claim from him any expence which may have attended the tilling of the land, or the digging of drains; because service is not appreciable but in consequence of a compact; and as the price set on the service, in the present instance, was upon the supposition of a produce, it follows that upon the produce being prevented, the cultivator is not entitled to any thing. If, however, the crop have begun to grow, although it be still unfit for reaping, the land must not be sold for the payment of the proprietor's debts until the grain be ready to cut down; because if the lands were to be sold, under such a circumstance, the sale would be injurious to the right of the cultivator; whereas, by waiting until the crop is ready, it only occasions a small delay in the payment of the proprietor's debts, which is the lighter evil of the two. The *Kázee* must also, in this case, enlarge the proprietor, if he have been imprisoned on account of his debts; for it being unlawful immediately to sell the lands, the proprietor, in delaying to pay his debts, is guilty of no injustice, and imprisonment is intended as a retribution for injustice.

\* See Vol. III. p. 369.

If the term of the compact of cultivation should expire before the crop be ready for cutting, the cultivator must pay to the proprietor of the land a hire or rent for his [the cultivator's] proportion of the ground until the crop be ripe; and in the mean time any work which it may require must be performed by both parties according to their respective proportions. The reason of this is, that in thus prolonging the compact, and ordaining the payment of a rent, a regard is paid to the benefit and interest of both parties, wherefore it is necessary that it should be prolonged:—and it is also necessary that both should bear their proportions of the work or expences; because the compact which they entered into is expired, and the crop remains their joint property, and in cases of joint property the work is incumbent on both parties, in the same manner as the subsistence of a partnership slave. (It is otherwise where the proprietor of the land dies whilst the crop is yet green; for in that case it is incumbent on the cultivator to perform the whole of the work that may be required; because in such an event the compact is continued during the remainder of its term: and it [the compact] obliges the cultivator to sustain the whole burden of the work;—whereas, in case of the term of the compact expiring, it is no longer binding, and therefore the cultivator alone is not obliged to perform the work.) If, therefore, either party incur any expence after the expiration of the term, without consulting the other, or without an order from the *Kāzee*, he must bear it himself, as he had no right of himself to subject the other to any charges.

Rules in case of the compact expiring before the crop is ready to cut.

If, in the example above recited, the proprietor of the land should be desirous of taking the crop (which is still green) after the expiration of the term of the compact, yet he must not be allowed to do so, because it would be an injury to the cultivator. If, on the contrary, under the same circumstance, the cultivator be desirous of taking the green crop, the proprietor of the land has three things in his option; for he may either pull up the crop and divide it, or he may keep it altogether and make an allowance to the cultivator, equivalent to his

H 2

share

share of it; or he may take care of the crop until it be fit for reaping, in which case he may deduct from the share of the cultivator the amount of the expence incurred on that account;—because if the cultivator should chuse to desist from labouring, on the expiration of the term of the compact, he cannot be compelled, since it is prolonged with a view to his benefit, which he himself has forsaken; and no injury is occasioned to the proprietor of the ground, as he has three modes in his option, by either of which injury is prevented.

If the cultivator die, his heirs may continue the cultivation, but are not entitled to wages.

If the cultivator should die after the crop has begun to grow, and his heirs should offer to continue the cultivation until it be fit for reaping, and the proprietor of the land should not consent, in this case they are nevertheless authorised to continue the cultivation, as the proprietor will sustain no injury thereby; but they are not entitled to any hire or wages, as the compact is continued with a view to their benefit. If, on the contrary, the heirs should desire to pull up the crop, and not to continue to cultivate, they cannot be compelled to continue to cultivate, for the reason above assigned; but the proprietor of the ground has in his option the three modes already recited.

The incidental charges are sustained by the parties in proportion to their respective shares.

The expence of cutting down the crop, of carrying it to the stack, of thrashing it, and of cleaning the grain from the straw, falls upon both the parties in proportion to their several shares. If, therefore, they were to stipulate in the compact that the expences shall fall on only one of them, the compact would be invalid. In short, all the above mentioned charges must be sustained by both parties in proportion to their several shares, and not by any one of them in particular; because, when the crop is ready, the object of the compact being accomplished, the compact itself is at an end; and as the crop remains the joint property of the parties, and no compact or stipulation is left in force betwixt them, it follows that any expences which may be afterwards required on account of their joint property ought to fall upon both. Besides, if they stipulate that those expences shall fall on one of

of them only, such a stipulation is inconsistent with the true spirit of the compact, as it tends to the advantage of one party over the other; and all stipulations having such a tendency invalidate the compact itself, in the same manner as a stipulation by which the cultivator is bound to *carry* the grain, or to *grind it into flour*. *Abbo Yoofof* is, however, of opinion that where the parties agree that the operations above-mentioned shall fall upon the cultivator, it is lawful, because of custom. The sages of *Balkh* concur in this opinion; and the *Shims-al-Ayma* observes, that this doctrine is authentic, and that the practice prevails in his country. In fine, every operation of agriculture, previous to the maturity of the crop, (such as watering and watching it,) falls upon the cultivator; and every subsequent operation requisite until the partition, (such as reaping, &c.) falls equally upon both; and, lastly, every operation that is necessary *after* the partition, (such as carrying, watching, &c.) falls upon each of them severally, for their respective shares.

General rules  
in compacts  
of cultivation,

THE foregoing rule holds good, also, in cases of *Mofakát*, or compacts of gardening; that is to say, all operations previous to the maturity of the fruit, such as watering, grafting, and watching the trees, fall upon the gardener; and all subsequent operations, such as gathering the fruit, and watching it, previous to a partition, fall upon both. If, therefore, it be settled betwixt the parties that the trouble of gathering the fruits shall fall upon the gardener, it is disapproved, according to all our doctors, as being uncustomary;—and all operations, after partition, must be performed by each with respect to his own share.

and of gar-  
dening.

IF, in compacts of cultivation, the parties be desirous of cutting down the crop whilst it is young,—or, in compacts of gardening, of pulling the dates whilst they are sour or moist, the labour of these operations falls upon both, for the intention and desire of performing them terminates the compact, in the same manner as if the crop or dates had arrived at maturity.

H E D A R A .



# H E D A R A .

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## B O O K XLI.

### Of MOSAKAT, or COMPACTS of GARDENING\*.

Nature of a  
compact of  
gardening.

**M**OSAKAT, in the language of the law, signifies, a compact entered into by two men, by which it is agreed that the one shall deliver over to the other his fruit-trees, on condition that the other shall take care of them, and that whatever is produced shall belong to them both, in the proportions of one half, one third, or the like, as may be stipulated. *Haneefa* alleges, that a compact of gardening, stipulating an indefinite proportion of the produce, such as an *half*, or a *third*, is invalid. The two disciples, on the contrary,

\* Applying, more particularly, to the plantation and culture of *date* and other fruit-trees.

maintain

maintain that it is valid, provided a term or period be expressed; and this is approved. It is to be observed, that compacts of gardening are frequently termed *Māmilat* as well as *Mosakāt*; and the same laws hold with respect to them as those which have been laid down with respect to compacts of cultivation.

(SHAFEI is of opinion that compacts of gardening are valid; and that compacts of cultivation are only so, where they happen in subordination to the former; as, for example, where the fruit trees grow in fertile and clean ground, which is watered for the nourishment of the trees, and the proprietor of them directs the cultivator to sow a crop on the ground on condition that he shall get a share, such as one half of the produce. The reason he assigns is, that the original thing, in this point, is a contract of *Mozāribat*; and to that a compact of gardening bears a nearer resemblance than a compact of cultivation; for as, in compacts of gardening, the partnership subsists in the *produce*, and not in the *principal* thing, (namely, the *trees*,) so in contracts of *Mozāribat* the partnership subsists in the produce or profit, and not in the principal or stock;—whereas, in compacts of cultivation, if it be agreed that a partnership shall exist in the produce, and not in the principal, (namely, the seed)—in other words, if the parties agree that the one who furnished the seed shall receive an equal quantity of seeds from the crop, and that the remainder shall belong to them both, the compact is invalid.—As, therefore, compacts of gardening bear a nearer resemblance to *Mozāribat* than compacts of cultivation, it follows that they are the primary object, and that compacts of cultivation are lawful only as a dependant; like a right of drawing water, which cannot be sold separately, but is included, subordinately, in the sale of the land; or like a *moveable* article, (such as the furniture of a house,) which cannot be separately appropriated in *Wakf*, but is included in the appropriation of the house or ground on which it stands\*.)

Doctrine of  
Shafai upon  
this subject.

\* It would appear that this opinion of Shafai is introduced merely for the purpose of elucidation, as it is not opposed to any different opinions, and his doctrines are seldom ad-  
duced in practice by the followers of Alie.

Analogy requires the specification of a term; but it is not essential,

THE specification of a term is requisite in compacts of gardening, by analogy, in the same manner as in compacts of cultivation, the one being, in reality, a contract of *bire*, the same as the other. According to a more favourable construction, however, compacts of gardening are lawful without any specification of a term. Thus, if two men enter into a compact, by which it is agreed that the one shall deliver his date trees to the other, who shall water and nourish them until they produce fruit, and it become ripe, and no particular period (such as a *year*, or the like) be specified, the compact is nevertheless valid, and continues in force with respect to the first fruit that may be produced; for the season for producing and ripening fruit is known, and seldom differs much. In the same manner also, if two men enter into a compact, and agree that the one shall deliver to the other the roots of shrubs, which are in the ground\*, and that the other shall water and nourish them until they yield ripe seed, to be shared between them, without mentioning any term, the compact is nevertheless valid, and takes place, with respect to the first seed that shall be produced and arrive at maturity; because as seed is of the same nature as fruit, the period of its maturity being equally known, it is, therefore, needless to settle any limited time. It is otherwise with regard to compacts of cultivation, which are invalid unless a period be settled; because the time of commencing the cultivation differs greatly, some crops being sown during the autumn, some during the winter, and others during the spring; and as there is thus a difference in the time of beginning the cultivation, the period of its ending cannot be known, for the ending depends on the beginning. It is also otherwise in cases of gardening, where one man delivers to another his young trees newly planted; for in that case the compact is not valid unless a period be fixed, it being very uncertain when the trees may arrive at that stage in which they are capable of bearing fruit, as that is a circumstance which depends on the

except where the trees are newly planted,

\* Meaning such vegetables as renovate from the root every season.

strength

strength and fertility of the soil. It is also otherwise where a man delivers to another his date garden, or his herb roots, desiring him to water and nourish them always until they die, or until their roots be pulled, and their vegetation be thereby terminated, or where he sets no bounds whatever to the duration of the compact with respect to the herbs; for in this case the compact is invalid, its period being uncertain, because herbs grow as long as their roots are suffered to remain in the ground.

or, where the compact is declared to be for as long as the trees, &c. shall last.

If the parties, in a compact of gardening, settle a period during which it is certain that the trees cannot bear fruit, it is invalid; because the object of such a compact, which is a partnership in the produce, is thus defeated.

The specification of too short a term invalidates the compact;

If the parties settle a period during which the trees *may* bear fruit, although they be frequently *later* in bearing, it is valid, because the object of the compact is not to a certainty defeated in this instance. If, therefore, the trees bear fruit within the prescribed term, it belongs to them both in the proportions which they may have previously settled; or, if they should not yield fruit until after it is expired, the gardener is entitled to a suitable hire for his labour, because the compact has in this case been rendered abortive by the error of the parties, in fixing a period too short for the trees to yield fruit, and which invalidates the compact in the same manner as if it had been *known* to be too short at the beginning. It is otherwise, however, if the trees afterwards yield *no* fruit; for in that case it is supposed owing to a *blight*, and not to the shortness of the period, that the compact proves abortive: the compact therefore holds good, and neither of the parties is entitled to receive any thing from the other.

but not where it is possible that the end of it may be answered within that period.

COMPACTS of gardening are lawful with respect to date trees, vines, &c. and also with respect to herbs and roots. According to the first opinion of *Shaf'ei*, they are lawful with respect to date-trees

The compact is valid with respect to fruit-trees, vines, herbs, and roots.

and vines only; because the validity of such compacts is founded on the sentence of the prophet regarding *Kheebir*, which is confined solely to these two. The argument of our doctors is, that the validity of such compacts is founded on their utility, and consequently is established regarding other things as well as dates and vines;—and in answer to *Shafëi*, it is observed, that the sentence of the KORAN regarding *Kheebir* does not admit of so confined a construction; for the inhabitants of that country cultivated all kinds of trees and *herbs*.

The compact cannot be dissolved by either party, but under some plea or pretext.

THE proprietor of the orchard cannot dissolve the compact unless he have some plea for so doing, such as when the claims of his creditors oblige him to sell it. In the same manner also, the gardener cannot cease to work, and thereby dissolve the compact unless he adduce some plea, such as sickness. It is otherwise in compacts of cultivation; for (as has been already observed) in those instances the party who supplies the seed is at liberty to dissolve the compact at any time previous to the sowing.

A compact may be entered into whilst the fruit is *green*; but not after it is *ripe*.

IF two men enter into a compact of gardening, to this effect, that the one shall deliver over to the other his date orchard, at a time when the fruit has already appeared, but is still very small, and may, by watering and proper care, become full and large, it is valid;—whereas, if the fruit were arrived at perfection, and were incapable of being further improved by care, it would be invalid. In the same manner also, if two men enter into a compact of cultivation, by which it is agreed, that the one shall deliver over to the other his crop, being yet green, and unfit for reaping, the compact is valid; whereas if the crop be fit for reaping it is invalid. The reason of this is, that the labourer is entitled to a share of the produce on account of his labour; but if the compact were to hold good when his labour can have no effect, he would be entitled to a share without labour, and this is not admitted in the LAW.

WHEN

WHEN compacts of gardening are invalid, the gardener is entitled to suitable wages, as an invalid compact of gardening is equivalent to an invalid contract of hire, and therefore resembles an invalid compact of cultivation.

If the compact be invalid, the gardener gets wages.

If, in a compact of gardening, one of the parties should die, the compact becomes null, because it is in reality a contract of hire.—If the owner of the orchard die whilst the fruit is yet green, the gardener may continue to work as usual until it be ripe, notwithstanding the dissent of the heirs.—(This proceeds upon a favourable construction; for by continuing the compact, the gardener is prevented from suffering an injury, and none is occasioned to the heirs.)—But if the gardener should rather chuse to submit to the injury, the heirs have in that case three things at their option;—in other words, they may either divide the green fruit, agreeably to the proportion stipulated,—or, they may keep the whole of the green fruit, and pay to the gardener the value of his proportion,—or, lastly, they may take care of the fruit until it be ripe, and expend such sums as may be necessary for that purpose, and afterwards recover a proportionable part of the expence from the share of the gardener;—for the gardener is not at liberty to occasion an injury to the heirs.

The compact is annulled by the decease of either party. —Rules in case of the proprietor dying.

If the gardener die, his heirs may continue to work, although the proprietor should not consent thereto, because it tends to their mutual benefit. If, on the contrary, the heirs of the gardener decline working, and rather chuse to gather the fruit whilst it is still green, the proprietor of the orchard has the three things in his option, as mentioned above.

Rule in case of the gardener dying.

If both the parties die, the heirs of the gardener may continue to work; for as, if the gardener had lived, and the proprietor of the orchard had died, he [the gardener] might have continued to work, it follows that his heirs, as being his substitutes, have the same thing

Rule in case of both parties dying.

in their option. If, however, they should decline it, the heirs of the proprietor are in that case at liberty to pursue either of the three ways above mentioned.

Rules in case of the compact expiring whilst the fruit is yet green.

If the term of the compact should expire whilst the fruit is still green and unripe, the gardener may continue in his employment until it become ripe; and in this case he is not liable for any rent on account of the trees, the letting of trees being unlawful. It is otherwise with respect to compacts of cultivation; for if their term expire whilst the crop is yet green, the cultivator may continue to work until it be fit for reaping,—but he is liable for the rent of the ground, the letting of ground being lawful.

If the term of a compact of gardening expire at a time when the fruit is still green, the gardener alone is obliged to perform the rest of the work; whereas, on the contrary, if the term of a compact of cultivation expire at a time when the crop is still green, both parties are obliged to work until the crop be brought to maturity.—The reason of this distinction is that, in compacts of cultivation, the cultivator being liable for the rent of the ground after the expiration of the term of the compact, it would be unjust that he alone should afterwards perform the labour; whereas, in cases of compacts of gardening, the gardener, as not being liable for any rent, is obliged to perform the work alone, after the expiration of the term, in the same manner as before.

The compact may be dissolved by any plea or pretext.

COMPACTS of gardening may be dissolved by particular pleas,—such as where the gardener is a thief, and there is reason to be apprehensive of his stealing the branches or leaves of the date trees, or the fruit, before it is ripe,—or, where he [the gardener] is disabled from working by sickness.

—A question has arisen whether, if the gardener be desirous of relinquishing his work, it is lawful for him so to do?—concerning which two opinions are recorded, ONE, that it is lawful; and ANOTHER, that

that it is not so.—This apparent difference may, however, be reconciled, by supposing that the former opinion alludes to cases wherein it is stipulated that the gardener shall work *with his own hands*, which condition he is, by reason of sickness, unable to fulfil.

IF a man deliver to another a piece of open ground, for a certain number of years, that he may plant trees thereon, and stipulate that the trees and the ground shall be in partnership between them, each holding an half,—it is invalid, for two reasons; FIRST, because they have stipulated a partnership in the ground, being a thing which already exists without the previous aid of the gardener's labour; and, SECONDLY, because such a compact is liable to the same objection as *Kafeez Tehàn*; for in this instance the master of the orchard in effect hires the gardener, and settles, as his wages, a part of the thing produced by his labour, namely, one half of the trees.—In this case, therefore, the whole of the fruit and trees go to the master of the ground; and the gardener is entitled to the price of his trees, and also to an adequate consideration as the hire of his labour; for as it is impossible to restore to him the trees, because of their adhesion to the ground, he necessarily gets their value, and also an adequate hire;—nor is his hire included in what he receives for the trees; that is to say, they are *both* due, distinctly; the use of labour being in this case of itself capable of estimation.

A lease of open land, for planting, in consideration of a part of the produce, is invalid.

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HEDAYA.



# H E D A R A.

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## B O O K XLII.

### Of ZABBAH, or the Slaying of Animals for Food\*.

All animals killed for food, except fish and locusts, must be slain by *Zabbah*.

**A**LL animals, the flesh of which is eatable, except fish and locusts, are unlawful, unless they be slain by *Zabbah*:—but when slain by *Zabbah* they are lawful, as by means of *Zabbah* the unclean blood is separated from the clean flesh,—whence it is that all animals *not* eatable, (such as *rats*, *dogs*, or *cats*,) are rendered clean † by *Zabbah*, excepting only hogs and men.

\* The *Arabic* lexicographers define *Zabbah* to signify, in its literal sense, the act of *cutting the throat*; in the language of the *LAW* it denotes the act of slaying an animal agreeably to the prescribed forms, without which it is not considered as eatable.

† That is to say, their flesh may be used in medical compositions; but still it cannot be eaten as ordinary food.

ZABBAH

ZABBAB is of two kinds;—I. *Ikkhîdree*, or of choice, (that is, *voluntary*, or *at pleasure*,) which is effected by cutting the throat above the breast;—and II. *Ixtirâree*, or of necessity, (that is, *at random*, *from necessity*,) which may be effected by a wound on any part of the animal's body.—The latter kind, however, is merely a substitute for the former, and accordingly is not of any account unless the former be impracticable, as the former is more effectual in extracting the blood: but the latter suffices where the other is impracticable; as mankind are required to act only according to their ability.

Zabbab is of two kinds, by choice, and of necessity.

It is one of the laws of *Zabbab* that the person who performs it be either a *Mussulman* or a *Kitâbee*.—The *Zabbab* of a *Mussulman* is therefore lawful; and so also the *Zabbab* of a *Kitâbee*, although he should not be a subject of a *Mussulman* state,—provided, however, that it be done in the name of GOD, for in the KORAN we find these words, “ THE VICTUALS OF *Kitâbees* ARE LAWFUL TO YOU.”

It must be performed by a *Mussulman*, or a *Kitâbee*

THE *Zabbab* is lawful provided the slayer be acquainted with the form of the *Tasmeedâ*, or invocation in the name of GOD, the nature of *Zabbab*, and the method of cutting the veins of the animal; and it signifies not whether the person be a man or a woman, an infant or an idiot, a circumcised person or an *uncircumcised*.

(provided he be a person acquainted with the form of invocation,) whether man or woman, infant or idiot.

AN animal slain by a *Magian* is unlawful; because the prophet has said, “ *Ye may deal with them as well as with KITABEES; but ye must not marry their women, nor eat of animals slain by them;*”—and also, because a *Magian* is a polytheist, and does not acknowledge the unity of GOD.

It cannot be performed by a *Magian*.

THE *Zabbab* performed by an *apostate* is unlawful; because he is not permitted to continue in the faith to which he has turned, but must rather suffer death.—It is otherwise with respect to a *Kitâbee*; for if he change his religion, he is permitted (according to our doctors)

an *apostate*.

to continue in that which he has adopted; and the law will still consider him, with respect to *Zabbab*, in the same light as the people of that faith which he has embraced.

or an idolater.

THE *Zabbab* of an idolater is unlawful; because he does not believe in the prophets.

Game slain in any place by a *Mobrim* is unlawful, or slain by any other person in holy ground.

ANY species of *game* slain by a *Mobrim*\* is unlawful, although it be not slain within the holy territory†:—and in the same manner, any game slain in the holy territory is unlawful, although the slayer be *not* a *Mobrim*. It is otherwise where a *Mobrim*, or any other person, slays an animal that is not game either in the holy territory or in any other place; for this is sanctioned by the LAW, because the holy territory affords no protection to goats, and the slaying of goats by a *Mobrim* is not prohibited.

Rules with respect to the *Tasmea*, or invocation.

IF the slayer wilfully omit the *Tasmea*, or invocation “*in the name of God*,” the animal ‡ is carrion, and must not be eaten. If, however, he omit the invocation through *forgetfulness*, it is lawful. *Shafei* is of opinion that the animal is lawful in either case.—*Malik*, on the contrary, maintains that it is unlawful in both; and that *Musfulmans* and *Kitabees* are considered as the same, with respect to the omission of the invocation. The same difference is to be found in the opinions of our doctors concerning a man omitting the invocation on letting loose a hound or a flying hawk at game, or when he shoots his arrow. The opinion of *Shafei*, in this particular, is opposite to that

\* The appellation given to a pilgrim during his residence at *Mecca*.—It is also applied to any person who, having resolved to undertake a pilgrimage, lays himself under particular restrictions.

† Arab. *Arzal haram*: the territory in the neighbourhood of *Mecca*, where no animal of the *game* species is ever put to death.

‡ Arab. *Zabab*, meaning (literally) *the creature slain*.

of

of all our sages; for, previous to his time, it was the universally allowed opinion, that an animal slain under a wilful omission of the invocation was unlawful; the only point on which they differed being respecting the omission of it from *forgetfulness*. The sect of *Abu Abi* *Ibn Omar* were of opinion that an animal slain under an omission of the invocation from *forgetfulness* is also unlawful; whilst, on the contrary, the sects of *Alee* and *Ibn Abbas* deemed it lawful, but not under an omission made *wilfully*.—Hence *Abu Yoo* *saf* and the other *Haneefite* doctors have declared an animal slain under a *wilful* omission of the invocation to be utterly unlawful; and that the *Kázee* cannot authorize the sale of meat so killed, it being contrary to the current opinions of all our doctors. The arguments of *Shaf* *ee* on this point are twofold. FIRST, the prophet has said, “*Let MUSSULMANS slay in the name of GOD, whether they mention it with their tongues or not.*”—SECONDLY, If the invocation were essential to the legality of the animal, it could never be remitted on a plea of forgetfulness, any more than the purification essential to prayer.—Besides, admitting the invocation to be essential, still the *Mussulman* faith is a substitute for it, in the same manner as in a case of omission through forgetfulness. The arguments of our doctors, on the other hand, are threefold. FIRST, GOD has said, in the KORAN, “*EAT NOT ANY THING OVER WHICH THE NAME OF GOD HAS NOT BEEN MENTIONED.*”—SECONDLY, it is the universal opinion, as has been already remarked.—THIRDLY, the prophet has said, regarding *Addee* the son of *Hátim*, “*When thou hast let loose thy hound after game, and repeated the name of GOD, thou mayest eat of that game; but if another dog assist thine in killing the game, thou shalt not eat of it, because thou repeatedst the name of GOD over thine own dog and not over the other.*” it is therefore evident that the omission of the name of GOD renders the game unlawful. The argument of *Málik* is founded upon a literal construction of the passage of the KORAN, which we have quoted above, it not being particularly expressed therein that the *wilful* omission is unlawful; and the omission from *forgetfulness* lawful.

But the answer which we give to this argument is that the passage plainly alludes to an animal with respect to which the invocation has been *wilfully* omitted, the *letter* being here different from the *spirit* of the text, for if the spirit were according to the letter, the companions of the prophet (who hold the first rank in point of authority), would doubtless have drawn arguments from it, and the difference of opinion that is to be found amongst them would not have existed. The answer to *Shafai* is, that the analogy which he establishes betwixt wilful omission and omission from forgetfulness, is not just; because he that forgets acts under necessity, and the *Mussulman* faith is admitted as a substitute in his behalf; whereas he who wilfully omits acts under no necessity, — With respect, moreover, to the saying of the prophet quoted by *Shafai*, it evidently alludes to a case of omission through forgetfulness.

In the *first* species of *Zabbab*, it must be pronounced whilst the animal's throat is cutting;—and in the *second* species, upon shooting the arrow, or letting loose the dog or hawk at the game.

It is a condition of *Ithirree Zabbab*, that the invocation be pronounced over the animal at the time of slaying it,—whereas, in the case of *Zabbab Istirree*, (or of a man slaying an animal in hunting,) the condition is that the invocation be pronounced at the time of letting loose the hound or hawk, or shooting the arrow, which is termed an invocation over the instrument. The reason of this distinction is, that in the first case the power of the man extends to the slaying; whereas in the second it is confined to the act of letting loose the hound or hawk, or of shooting the arrow, and does not extend to their reaching the animal; wherefore the invocation must be pronounced at the instant of such act, which is in the power of the man.—Hence if a man throw a goat on its side, with an intention of slaying it, and then pronounce the invocation, and afterwards let that goat loose, and then, without repeating the invocation, slay another, this is not admissible, and the meat is unlawful; whereas if a man shoot an arrow at an animal, and pronounce the invocation, and the arrow, instead of the one which he aimed at, hit another animal, it is lawful;—and the same law holds in the case of letting loose a hound or hawk.—If

the man, having thrown the animal on its side and pronounced the invocation, should cast away the knife from his hand and take up another, and with it slay the animal, it is lawful;—whereas if he pronounce the invocation over one arrow, and then take another and shoot the game with it, it is unlawful, the instrument over which the invocation was pronounced having been changed.

It is abominable to add any other thing to the name of God at the time of performing the *Zabbah*, such as if a man were to say “O God, accept this from me!”—This may occur in three different shapes; as, first, where he says any thing besides the name of God, without pausing between them, or making use of the conjunction “and,” as in the example cited above,—or, where he says, *Bism Illah, Mohammed Rassool Illah*, “in the name of God, Mohammed is his prophet,” which would be abominable, but the meat would not be unlawful;—secondly, where he says any thing besides the name of God, without making a pause, but using the conjunction; as if he were to say, “*Bism Illah wa Ism Falan*,” “in the name of God and the name of another;” or “*Bism Illah wa Falan*,” “in the name of God and another;”—in either of which cases the animal slain is unlawful: and, thirdly, where he says any thing besides the name of God, separately, and by itself, either before or after the invocation, and the throwing down of the animal, which is of no consequence, and does not render the meat unlawful, for it is related of the prophet, that he said prayers immediately after performing *Zabbah*.

It is a condition of *Zabbah* that nothing but the invocation be said; that is, that no prayer or other matter be mentioned. If, therefore, a man, during the *Zabbah*, instead of “*Bism Illah*,” (“in the name of God,”) were to say, “*Illahoom agfar lee*,” (“O God, forgive me!”) the animal slain is not lawful, as this is a prayer or intreaty. If, however, instead of “*Bism Illah*,” he say “*Albamdolillab*,” (“praise be to God,”) or “*Subhanillab*,” (“God is purest,”) and

Nothing must be said except the invocation.

mean this as an invocation, it is sufficient. But if he sneeze during the *Zabbab*, and exclaims "*Alhumdalillah!*" ("praise be to God!") it is not sufficient, (according to the *Rawdyet-Sabeeh*), because the exclamation will then be considered as *thanks*, and not as the *invocation*. The method which has frequently prevailed, of saying "*Bism Illah oo Illah Akbáro*," ("in the name of God, and God is the highest,") during the *Zabbab*, is copied from *Ibn Abbas*.

Proper method of slaying animals.

THE place for slaying is betwixt the throat and the *libba*, [the head of the breast-bone,] because the blood freely issues from a wound given in that place: the *Zabbab*, therefore, when performed any where within that space, is lawful.

THE vessels which it is requisite to cut in *Zabbab* are four; namely, the *Halkoom*, or wind-pipe; the *Mirree*, or gullet; and the *Wadhjan*, or two jugular veins. This is founded on a saying of the prophet. According to *Shafei* it is sufficient if *two* of these vessels (namely, the wind-pipe and gullet) be cut. According to *Malik*, on the contrary, three of the four do not suffice, but it is requisite that they be all cut. According to *Haneefa* the animal is lawful where three of the four vessels are cut, which ever they may be. *Abou Yoofof* was also at first of this opinion; but he afterwards declared it indispensably requisite that the windpipe and gullet should be cut, and one of the two blood-vessels; because as the effusion of the blood is the design of cutting the blood-vessels, one of them may serve as a substitute for the other;—but as the gullet and windpipe, on the contrary, answer two different purposes, (the one being the channel of food, and the other the channel of respiration, it is requisite therefore that they be both cut, the one being unfit to stand in the place of the other. The argument of *Haneefa* is that the majority represents the whole in many rules of the LAW; and when three of the four vessels are cut, the majority is cut, and the object (which is the speedy effusion of the blood and deprivation of life) is effected, since

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upon

upon three of the above mentioned vessels being cut, the animal cannot remain alive. If, therefore, to avoid giving additional pain, only three vessels be cut, it is sufficient.—It is otherwise where only *two* are cut; for as, in that case, a cutting of the majority, representing a cutting of the *whole*, does not exist, it follows that the animal so slain is not lawful.—*Mohammed* is of opinion that the greater part of each of the four vessels should be cut, because every one of them may be considered as a principal of itself, being separated from the rest. In the *Jama Sagheer*, also, he alleges that if one *half* of the wind-pipe, and one *half* of each of the blood-vessels, be cut, the animal is not lawful; but that if the *greater part* of the wind-pipe, and the *greater part* of each of the blood-vessels be cut, previous to the death of the animal, it is lawful;—and he has not made mention of any difference of opinion.

If a man slay an animal with nails, horns, or teeth, it may be eaten without apprehension, provided the nails, horns, or teeth, be detached from the place in which they grew. The act, however, is abominable\*, because it introduces the use of human members, and further, because it is productive of too much pain to the animal, and we are directed to perform the *Zabbah* in such a manner as may be most easy to it. *Shafei* is of opinion that an animal slain in the above manner is unlawful, and carrion; because the prophet has said, “*the ZABBAAH is lawful when performed with any thing that can draw blood, or cut the vessels, excepting the teeth and the nails, which are the instruments of the ABYSSINIANS †*”; and also, because it is a thing not allowed by the LAW any more than if the teeth or nails had been fixed in the place in which they grew. Our arguments, on the contrary, are that the prophet has said “*Spill the blood with whatever thing it may please thee*”; and it is likewise related that he said

It may be performed with nails, horns, or teeth, (detached from their native place,)

\* The force of this term is explained in a note a little farther on. † The *Abyssinians* are held in great contempt by the *Mussulmans*.

“*Cut*



~~“*God has enjoined us to be merciful to all: wherefore, when ye slay, let it be done in the most merciful manner; and when ye perform the ZABBAH, let one of ye sharpen your knife and do it in the easiest manner for the animal.*”~~ With respect to the saying quoted by *Shafii*, it alludes to nails and teeth fixed in their native place; for it was a frequent custom amongst the *Abyssinians* to slay cattle in that manner. Nails, moreover, when removed from their place, are instruments for cutting; and the object of *Zabbah*, namely, the effusion of the blood, may be accomplished with them, whence they are the same as a sharp iron or stone. But when they are in their place they slay by means of the force or weight applied to them, and the animal so slain is, in effect, *strangled*.

or with any sharp instrument.

It is lawful to slay with the rind of a reed, with a sharp stone, and with every thing that is sharp and capable of cutting the vessels and drawing the blood, excepting teeth and nails fixed in their native place.

Precautions to be observed by the slayer.

It is laudable in the slayer to sharpen his knife; for the prophet has said “*GOD has enjoined us to be merciful to all: wherefore, when ye slay, let it be done in the most merciful manner; and when ye perform the ZABBAH, let one of ye sharpen your knife and do it in the easiest manner for the animal.*”

It is abominable first to throw the animal down on its side, and then to sharpen the knife; for it is related that the prophet once observing a man who had done so, said to him, “*How many deaths do you intend that this animal should die?—Why did you not sharpen your knife before you threw it down?*”

It is abominable to let the knife reach the spinal marrow, or to cut off the head of the animal. The meat, however, in either of these cases, is lawful. The reasons of the abomination in cutting into the spinal marrow are, FIRST, because the prophet has forbid this; and, SECONDLY, because it unnecessarily augments the pain of the animal, which is prohibited in our LAW.—In short, every thing which

which unnecessarily augments the pain of the animal in *Zabbab* is abominable.

It is abominable to seize an animal destined for slaughter by the feet, and drag it to the place appointed for slaying it.

It is abominable to break the neck of the animal whilst it is still in the struggles of death; but when the struggles are over, it is not abominable to break the neck and strip off the skin, for then it is insensible to pain.

If a man slay an animal by first cutting it in the back of the neck, doing it however in such a manner as to cut the vessels whilst the animal is still alive, the meat is lawful, because the animal dies by *Zabbab*: but the act itself is abominable, as it unnecessarily augments the pain of the animal, being in effect the same as if he had first wounded the animal, and afterwards cut its vessels. If, on the contrary, the animal die previous to the cutting of the vessels, the meat is not lawful, because in this case the animal dies before the *Zabbab* has taken place.

The animal is lawful although it be wounded previous to cutting its throat.

In the case of all animals attached to man, and which do not fly from him, the *Zabbab* is performed by cutting the vessels:—but in the case of those which have become wild, and fly from him, the *Zabbab* is performed by chasing and wounding them; because where the *Zabbab Ikhtirree*, or *Zabbab of choice*, is impracticable, there is occasion for the *Zabbab Ixtirree*, or *Zabbab of necessity*; and there is such an impracticability regarding the latter class of animals, but not regarding the former. The *Zabbab Ixtirree* is also lawful regarding an animal which has fallen into a well, provided the other sort of *Zabbab* be impracticable.—*Malik* maintains that the meat is unlawful in both the foregoing cases,—that is, in the case of a wild animal, and of one which falls into a well,—because such instances are rare. We, again,

All tame animals must be slain by cutting the throat; and wild animals by chasing or shooting them.

again, say that as the impracticability of the *Zabbah Ikhtidree*, (which is allowed to be a valid argument,) exists in both these cases, it follows that the substitute, namely, *Zabbah Istiradee*, may be adopted: nor is what he observes (that "such instances are rare") admitted; on the contrary, they very frequently happen. In *Kadooree*, moreover, it is expressly said that it is lawful to use the *Istiradee Zabbah* towards all animals that fly from man;—and it is reported, from *Mohammed*, that if a goat become wild in the plains, the *Istiradee Zabbah* is lawful with respect to it; but if it become wild in the city, the *Istiradee Zabbah* is not lawful, because in the city it may be caught, and consequently the *Ikhtidree Zabbah* is not impracticable. With respect to cows and camels, however, the city and the plains are alike; because these animals attack, with their horns or their teeth, any person that attempts to catch them; whence it is impossible to catch them, even though it be in the midst of the city that they have become wild; and the *Ikhtidree Zabbah* is therefore impracticable. When, also, these animals attack a man, they are considered as wild, provided it be not in his power to catch them; wherefore if one of them should attack a man, and he with an intention of *Zabbah* kill it, the flesh of it may be eaten lawfully.

Camels must be slain by *Nabr*, rather than by *Zabbah*.

THE most eligible method of slaying a camel is by *Nabr*; that is, spearing it in the hollow of the throat, near the breast-bone, because this is agreeable to the *Sonna*, and also because in that part of the throat the vessels of a camel are combined. It is also lawful to slay it by *Zabbah*, although this be considered as abominable, since it differs from the *Sonna*. In regard to goats and oxen, it is most eligible to slay them by *Zabbah*, as being agreeable to the *Sonna*, and also because the vessels of a goat are assembled together in the upper part of the throat:—but they may also be speared like a camel, although this method be not approved, as being contrary to the *Sonna*.

The fetus of a slain animal

If a person, having slain a camel or cow, should find a dead fetus in

in the womb, such foetus is unlawful, whether it be covered with hair or not. This is the opinion of *Haneefa*; and it has been adopted by *Ziffer* and *Hasan bin Zeeyûd*. The two disciples maintain that, if the foetus be complete in its form, it is lawful; (and *Shafei* concurs with them in this opinion;) because the prophet has ordained the *Zabbah* of a foetus to be the *Zabbah* of the mother; that is to say, the *Zabbah* of the mother answers for that of the foetus likewise. Besides, the foetus is, in reality, a constituent part of the mother, as it is joined to her until separated by a pair of scissars or knife, subsists on the same food, and lives by the same breath;—and it is likewise considered as such in law, inasmuch that it is included in the sale of the mother, and is rendered free by the emancipation of the mother. The foetus, therefore, being a constituent part of the mother, it follows that the *Zabbah* of the mother serves also for it, when a separate *Zabbah* is impracticable, in the same manner as a wound in the case of game serves as a substitute for *Zabbah*. *Haneefa*, on the other hand, argues that a foetus is complete with respect to life; that is to say, that it has a separate existence, inasmuch as it may survive after the death of the mother, whence it is that a separate *Zabbah* is necessary, in case of its being alive. Moreover, if a person destroy a foetus he is subject to a pecuniary penalty; and the owner of it may emancipate it alone, without including the mother. It is also lawful to bequeath it in legacy, or to leave a legacy to it. Besides, the object of *Zabbah* is to separate the blood from the flesh; an object which cannot be accomplished, in the case of a foetus, by the *Zabbah* of the mother alone. It is otherwise with respect to wounding game, as in that case the blood is separated from the flesh, and though it be in an imperfect manner, yet as any other mode is impracticable, it is therefore considered as *Zabbah*. A foetus, moreover, is included in the sale of the mother, because the sale would otherwise be invalid, and from this necessity it is included. And it is likewise rendered free by the manumission of the mother, in order that a bond-infant may not be born from a freed-woman.

## SECTION.

*Of the Things which may lawfully be eaten, and of those which may not.*

All beasts and birds of prey are unlawful.

ALL quadrupeds that seize their prey with their teeth, and all birds which seize it with their talons, are unlawful, the prophet having prohibited mankind from eating them.—The reason of this prohibition is because MAN is held particularly dear, and it is to guard him, lest by eating of these animals their bad qualities might be communicated to him, and affect his disposition.

HYENAS and foxes, being both included under the class of animals of prey, are both unlawful.—(*Shafëi* maintains that they are both lawful.)—Elephants and weasels are also accounted animals of prey\*: and pelicans and kites are abominable, because they devour dead bodies.

Rooks are neuter: but carrion crows and ravens are unlawful.—Magpies, the crocodile, otter, all insects, and the ass and mule are unlawful.—Horses.

CROWS which feed on grain [rooks] are neuter†: but the crow of the wilderness [the *carrion* crow] and the raven, are not lawful.—According to *Haneefa* the magpie is neuter, like poultry; although it be said (upon the authority of *Abou Yoosaf*) that it is *abominated*, because it frequently eats dead bodies.—The crocodile and the otter, wasps, and in general all insects, are abominated. The ass and the mule are unlawful, because they are prohibited by the prophet.—The flesh of horses is held in abomination by *Haneefa* and *Malik*. According to the two disciples and *Shafëi* it is neuter; for it is mentioned in the *Hadees Jodbir* that the prophet permitted it; and some are of opinion that the milk of mares is also neuter.—According to *Haneefa*,

\* Arab. *Zoo-Nâb*; meaning, literally, *creatures which have canine teeth*. The elephant (although certainly not a beast of prey) is perhaps classed with those, because of his tusks.

† It is here proper to remark that, in the *Musulman* law, there are four gradations from legality to illegality. I. *Hilâl*, or positively *lawful*. II. *Mubâh*, or neuter: (that is, *indifferent*, and which may either be pursued or avoided.) III. *Ma'troob*, or abominable: (that is, *reprobated*, but which is nevertheless lawful.) IV. *Hirâm*, or positively *unlawful*: (that is, *prohibited*.)

the

the flesh of hares is neuter, because the prophet eat it, and commanded his companions to eat of it. Hares are neuter.

THE flesh and skin of all unlawful animals become pure after they have been killed according to the laws of *Zabbah*, excepting only men and hogs.—According to *Shafëi* they do not become pure.

No animal that lives in water is lawful except fish. *Málik* and a number of other learned men are of opinion that all water animals are lawful. Others again say that sea-dogs, sea-hogs, and mair-men, are unlawful. No aquatic animal is lawful except fish.

FISHES which, dying of themselves, float upon the surface of the water are abominated. According to *Shafëi* and *Málik* they are neuter. The rule observed amongst our sect is this.—Fishes which are killed by any accident are lawful, like those which are caught; whilst, on the contrary, such as die of themselves without any accident are unlawful, like those which are found floating on the surface of the water. There are, however, different opinions regarding such as die of extreme heat or cold. Fishes and locusts are lawful without being killed by *Zabbah*. Fish which perish of themselves are not lawful.

## H E D A R A.



## B O O K XLIII.

## Of UZHEEA, or SACRIFICE.

Sacrifice must  
be performed  
at the *Eed*  
*Kirbân*.

**I**T is the duty of every free *Mussulman*, arrived at the age of maturity, to offer a sacrifice on the *Eed Kirbân*, or festival of the sacrifice\*, provided he be then possessed of a *Nisâb*†, and be not a traveller. This is the opinion of *Haneefa*, *Mohammed*, *Ziffer*, and *Hasan*; and likewise that of *Abou Yoozaf*, according to one tradition.—According to another tradition, and also in the opinion of *Shafeï*, sacrifice is

\* This festival happens on the tenth of *Zee-hidjâ*, and was instituted in commemoration of *Abraham* having offered up his son *Ishmael* as a sacrifice to God, in consequence of a vision he had.—See *Sales's Korân*, Vol. II. p. 312.

† For the amount of *Nisâb*, see Vol. I. p. 1, to 27.

not an indispensable duty, but only *laudable*. *Tabavee* reports that in the opinion of *Haneefa* it is indispensable; whilst the two disciples hold it to be in a *strong degree* laudable.

THE offering of a sacrifice is incumbent on a man on account of himself, and on account of his infant child. This is the opinion of *Haneefa* in one tradition. In another (which is recorded in the *Zahir Rawdyet*) he has said that it is not incumbent on a man to offer a sacrifice for his child.—In fact, according to *Haneefa* and *Abou Yoofof*, a father or guardian are to offer a sacrifice at the expence of the child, (where he is possessed of property,) eating what parts of it are eatable, and selling the remaining parts that are valuable in their substance, such as the skin, &c. *Mohammed*, *Ziffer*, and *Shafei*, have said that a father is to sacrifice on account of his child at his own expence, and not at that of the child.

It is incumbent on a man, for himself, and for his infant children.

THE sacrifice established for *one* person is a goat; and that for *seven*, a cow or a camel.—If a cow be sacrificed for any number of people fewer than seven, it is lawful; but it is otherwise if sacrificed on account of eight.—If, also, in an association of seven people, the contribution of any one of them should be less than a seventh share, the sacrifice is not valid on the part of any.

The victim for *one* person is a goat; and for any number from *one* to *seven*, a cow or camel.

IF a camel that is jointly and in an equal degree the property of two men, should be sacrificed by them on their own account, it is lawful, according to the most authentic traditions:—and in this case they must divide the flesh by weight, as flesh is an article of weight. If, on the contrary, they distribute it from conjectural estimation, it is not lawful; unless they add to each share of the flesh part of the head, neck, and joints.

An animal held in joint property may be jointly offered in sacrifice.

IF a person purchase a cow, with an intent to sacrifice it on his own account, and he afterwards admit six others to an association with him

Others may be admitted to a share in



an animal  
purchased for  
sacrifice.

him in the sacrifice, it is lawful.—It is, however, most adviseable that he associate with the others at the time of purchase, in order that the sacrifice may be valid in the opinion of all our doctors; as otherwise there is a difference of opinion.—It is related, from *Haneefa*, that it is abominable to admit others to share in a sacrifice after purchasing the animal; for, as the purchase was made with a view to devotion, the sale of it is therefore an abomination.

It is not incumbent on  
the poor or  
travellers.

SACRIFICE is not incumbent on either a *poor* man or a *traveller*; for *Aboo Bickir* and *Omar Farook* did not offer the sacrifice of the *Eed* during their travels; and it is, moreover, related that *Alee* said, “*neither the prayers of Friday, nor the sacrifice of the Eed are incumbent on travellers.*”

The time of  
performing  
it.

THE time of the offering is on the morning of the day of the festival; but it is not lawful for the inhabitants of a city to begin the sacrifice until their priest shall have finished the occasional prayers. Villagers, however, may begin after break of day. The place, in fact, must regulate the time: Thus, where the place of celebration is in the country, and the performers of it reside in the city, it is lawful to begin in the morning: but if otherwise, it must be deferred until the prayers be ended.

If the victim be slain after the prayers of the mosque, and prior to those offered at the place of sacrifice, it is lawful; as is likewise the reverse of this.

SACRIFICE is lawful during three days,—that is, on the day of the festival, and on the two ensuing days.—*Shafei* is of opinion, that it is lawful on the *three* ensuing days. The sacrifice of the day of the festival is, however, far superior to any of the others. It is also lawful to sacrifice on the *nights* of those days, although it be considered as abominable.—Moreover, the offering of sacrifices on these days is  
6 more

more laudable than the custom of omitting them, and afterwards bestowing an adequate sum upon the poor.

If a person neglect the performance of the sacrifice during the stated days, and have previously determined upon the offering of any particular goat, for instance; or, being poor, have purchased a goat for that purpose;—in either of these cases it is incumbent on him to bestow it alive in charity. But, if he be rich, it is in that case incumbent on him to bestow, in charity, a sum adequate to the price, whether he have purchased a goat with an intent to sacrifice it, or not.

If the sacrifice be delayed beyond the proper time, the victim must be bestowed in charity.

It is not lawful to sacrifice animals that are blemished,—such as those that are blind, or lame, or so lean as to have no marrow in their bones, or having a great part of their ears or tail cut off. Such, however, as have a great part of their ears or tail remaining may lawfully be sacrificed.—Concerning the determination of a *great part* of any member, there are indeed various opinions reported from *Haneefa*.—In some animals he has determined it to be the *third*; in others *more* than the third; and in others, again, only the *fourth*.—In the opinion of the two disciples, if more than the half should remain, the sacrifice is valid; and this opinion has been adopted by the learned *Aboo Lays*.

The sacrifice of a blemished animal is not admitted.

If an animal have lost the third of its tail, or the third of its ear, or eye-sight, it may be lawfully sacrificed:—but if, in either of these cases, it should have lost *more* than a third, the offering of it is not lawful.—The rule which our doctors have laid down to discover in what degree the eye-sight is impaired, is as follows. The animal must first be deprived of its food for a day or two, that it may be rendered hungry; and having then covered the eye that is impaired, food must be gradually brought towards it, from a distance, until it indicate, by some emotion, that it has discovered it.—Having marked the particular spot at which it observed the food, and uncovered the

but a trifling blemish does not render it exceptionable.

weak

weak eye, the perfect eye must then be bound, and the same process carried on, until it indicate that it has observed it with the defective eye. If then the particular distance from those parts to where the animal stood be measured, it may be known, from the proportion they bear to each other, in what degree the sight is impaired.

An animal wanting a horn, or mad, or castrated, may be sacrificed.

If a person sacrifice an animal without a horn, it is lawful;—and so likewise where the horn is broken, or where the animal is mad or castrated.—Many, however, have said, that it is not lawful to sacrifice a mad animal, unless it eat food, in the same manner as it is not lawful to sacrifice a *Gurgen* [the offspring of a wolf and goat] unless it be fat. With regard to animals that want teeth, it is reported from *Abou Yoosaf* that they may be lawfully sacrificed, provided they be able to chew,—or (according to another report) provided the greatest of their teeth be remaining. Animals, however, that are born without an ear cannot lawfully be sacrificed. What is here said respects such blemishes as may have existed in the animal, previous to the purchase of it; for if it be perfect at the time of purchase, and afterwards contract such a blemish as to render the sacrifice of it unlawful, and the proprietor be rich, it is in that case incumbent on him to sacrifice another; whereas, if he be poor, he may lawfully sacrifice the same. The reason of this is, that as an offering is incumbent on a rich man originally, and not on account of his purchase, the animal therefore which he buys is not particularly set aside for the offering; whereas, on the contrary, an offering not being incumbent on a poor man, except when he purchases an animal with that intent, the animal so purchased is therefore particularly destined for the purpose:—and accordingly, our doctors hold that if an animal, purchased with a view to be offered, should die, it is incumbent on the proprietor, if he be rich, to substitute another, but not if he be poor;—or, if the animal be either lost or stolen, and the purchaser, having bought another, should then recover the first, in such case it is incumbent on the proprietor, if he be rich, to sacrifice one of them, whether it be the first

first bought or the second; but if he be poor, he is under an obligation to sacrifice both.

If it should happen that the goat, having been turned over in order that the sacrifice might be performed, in the struggle breaks one of its legs, in that case, provided the sacrifice be immediately made, it is lawful and sufficient. So also, it is lawful, if the animal, in that situation, having received any hurt, should run away, and having been immediately and without delay taken, should then be sacrificed. *Mohammed* has likewise judged the sacrifice lawful, if, in this case, the animal should not be retaken until after some delay:—in opposition to the opinion of *Abou Yoosaf*.

Any accident befalling the victim at the time of slaying it does not invalidate the sacrifice.

It is not lawful to offer a sacrifice of any animal except a camel, a cow, or a goat; for it is not recorded that the prophet or any of his companions ever sacrificed others. Buffaloes, however, are lawful, as being of the species of a cow. Every animal of a *mixed* breed, moreover, is considered as of the same species with the mother.

Goats, camels, and cows alone are lawful in sacrifice.

THE sacrifice is lawful of any animal of the three species above mentioned, although it be only a *Soonee*\*: but not if younger; excepting, however, a sheep, which may be sacrificed when a *Judday*, or so young as to have no teeth; and in this case our doctors have made it a condition that the sheep be of large stature, inasmuch as to have the appearance of a *Soonee* at a little distance. The period of *Judday* in sheep (according to our doctors) is at the expiration of six months, and the commencement of the seventh. The time of *Soonee* in goats or sheep is at the age of one year; in cows, at the age of two; and in camels at the age of five years.

Age at which an animal is fit for sacrifice.

\* The sheep and the goat are held to be of the same species.

If one of seven joint sacrificers die, the consent of his heirs is requisite to the sacrifice.

If seven persons purchase a cow for sacrifice, and one of them afterwards die, and his heirs desire the other six to sacrifice a cow on account of themselves, and on account of the dead, it is lawful;—whereas, if they sacrifice it without the consent of the heirs it is not lawful.

If a Christian, or any person whose object is the flesh, and not the sacrifice, be a sharer with six others, the sacrifice is not lawful on the part of any.

Rules with respect to the disposal of the flesh, &c. of the victim.

It is lawful for a person, who offers a sacrifice, either to eat the flesh, or to bestow it on whomsoever he pleases, whether rich or poor: and he may also lay it up in store.

It is most advisable that the third part of the flesh of a sacrifice be bestowed in charity.

It is lawful either to bestow the skin of a sacrifice in charity, or to make any utensil of it, such as a bucket, sieve, or the like. It is likewise lawful to barter it for any unconsumable article that yields profit in its substance:—but it is not allowable to barter it for any thing *consumable*, as vinegar, and such like. Flesh, in these respects, is considered in the same light as the skin, according to the most authentic traditions.

If the flesh of a sacrifice be sold along with the skin of it for money, or for any thing that is not profitable but in consumption, it is incumbent on the seller to devote the price to the poor; and the sale is valid.

It

It is not lawful to give a part of the sacrifice in payment to the butcher.

It is abominable to take the wool of the victim and sell it before the sacrifice be performed; but not after the sacrifice. In the same manner, it is abominable to milk the victim and sell the milk.

It is most advisable that the person who offers the sacrifice should himself perform it, provided he be well acquainted with the method; but if he should not be expert at it, it is then advisable that he take the assistance of another, and be present at the operation.

It must be slain by the sacrificer, or in his presence.

It is abominable to commit the slaying of the victim to a *Kitábee*. If, however, a person order a *Kitábee* to slay his victim, it is lawful. It is otherwise where a person orders a *Magian*, or worshipper of fire, to slay his victim, for this is inadmissible.

A *Kitábee* may be employed to slay it, but not a *Magian*.

If two persons commit a mistake, each slaying the offering of the other, it is lawful; and no compensation is on that account due from either. If, also, having erred in this manner, they should eat the flesh, and then discover the mistake, in this case it is requisite that they sanctify the act of each other, and sacrifice is then fulfilled. If, on the contrary, they refuse to do so, and dispute the matter, each is in that case entitled to take a compensation for the value of the flesh of his offering from the other, and must then bestow such compensation in alms, as it is a return for the flesh of his offering: and the same rule also obtains where a person *destroys* the flesh of the offering of another.

Two persons slaying each other's victim by mistake must make a mutual compensation.

If a person usurp a goat, and sacrifice it, he is in that case bound to compensate for its value, and his offering is thereby rendered

valid; Case of sacrifice of an usurped animal.

valid; because upon paying the compensation he is held to have been proprietor of the goat from the time of his having usurped it. It is otherwise where a person sacrifices a goat committed to him as a deposit; for this is not valid; because he is obliged to compensate for it (not on account of the *animal*, but) on account of the *sacrifice*, and hence his property in it is not established until after he has sacrificed it.

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*HEDAYA.*

# H E D A Y A.

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## B O O K XLIV.

### Of KIRAHEEAT, or ABOMINATIONS.

THE author of the *Hedaya* remarks that our doctors have disagreed concerning the extent in which the term *Makroob* \* is to be received.—*Mohammed* was of opinion that every thing *Makroob* is unlawful ; but as he could not draw any convincing argument from the sacred writings in favour of this opinion, he renounced the general application of *unlawfulness* with respect to such articles, and classed

Difference of opinions concerning the extent of the term *Makroob*.

\* *Makroob* is the participle passive of *Kuribâ*, to *abominate* ; this word is frequently taken in a milder sense ; and may relate to any thing *improper* or *unbecoming*.

them



them under the particular description of *Makrooh*, or abominable.—It is recorded, on the other hand, from *Haneefa* and *Aboo Yoosaf*, that *Makrooh* applies to any thing which, in its qualities, nearly approaches to *unlawful*, without being *actually* so.—This article is comprehended under a variety of heads or sections.

## S E C T. I.

## Of EATING and DRINKING.

It is abominable to eat the flesh or to drink the milk of an *afs*, or to take the urine of a *camel*, unless medicinally;

HANEEFA has said that the flesh and milk of an *afs*, and the urine of a camel, are abominable.—According to *Aboo Yoosaf* the urine of a camel may be taken as a medicine; but with respect to milk, it is a secretion from the blood, and is therefore subject to the same rule with the flesh of the animal from which it is produced.

or to use vessels of gold or silver.

It is not allowable, either to men or women, to use a vessel of gold or silver in eating, drinking, or in keeping perfumes; because the prophet has said, with respect to any person who drinks out of a vessel of silver or gold, that “*the fire of hell shall enter into his belly*;” and it is also related, that a person having brought water for *Aboo Hareerā* in a silver vessel, he refused to drink, declaring that the prophet had prohibited him from drinking out of such a vessel. The prohibition, therefore, being established with respect to drinking, it follows that the rule extends to the using of oils, and similar articles, that being in effect the same with drinking, since in both cases the *use* of a vessel of gold or silver is induced,—whence it is that the use of a golden or silver spoon is abominable, as also the use of a silver or

golden

golden bodkin for drawing antimony along the eye-lids, or of boxes for holding antimony, or any other thing, made of those metals.

THE use of vessels of lead, glass, crystal, and agate, is permitted. *Shaf'ei* maintains that those are abominable, because they resemble gold or silver in point of splendor.

It is allowable to use vessels of lead, glass, crystal, or agate;

It is allowable, according to *Haneefa*, to drink out of an wooden vessel ornamented with silver, provided the particular part to which the lip is applied be void of it. In the same manner, also, it is permitted to ride upon a saddle interwoven with silver, provided the space allotted for the seat be plain; and this rule likewise holds with respect to a couch or sofa.—According to *Abou Yoosaf*, on the contrary, all those are abominable.—From *Mohammed* there are two traditions on this point; one corresponding with the opinion of *Haneefa*, and the other with that of *Abou Yoosaf*. After the same manner they have disagreed concerning the use of a vessel or chair adorned both with gold and silver; concerning swords, mosques, frames of glasses, and books, when they are ornamented either with gold or silver; and also concerning stirrups, bridles, or cruppers of that description.—These differences of opinion, however, exist only where the gold and silver is so applied, in any of these cases, that it is to be separated only by means of some difficult process: but the gilding of things, either with gold or silver, in such a manner as to require art to separate it, is unanimously allowed.—The argument of the two disciples is that the use of one part of a vessel includes the use of the whole; wherefore they hold it equally abominable as if the part applied to use were likewise of gold or silver. *Haneefa*, on the other hand, argues that ornaments of gold or silver, when not applied to use, are merely appendages, and therefore not to be regarded; whence the use of the article is allowable, in the same manner as wearing a garment which is trimmed with silk, or a ring which has a piece of gold set in it.

or to drink out of vessels, or ride upon a saddle, or sit upon a chair or sofa, ornamented with gold or silver.

IF

The information of an infidel may be credited with regard to the lawfulness of any particular food.

IF a person send his servant, or a hireling, being a *Magian*, to purchase meat, and he purchase meat accordingly, and acquaint his master that he had bought it from a *Jew*, a *Christian*, or a *Mussulman*, it is lawful for him [the master] to eat the food so purchased; because the word of an infidel is creditable in all matters of a temporal nature, as he is presumed to be possessed of reason, and falsehood is prohibited in his religion: besides, there is a necessity for believing his assertion in temporal concerns, from their frequent occurrence. If, on the contrary, the servant inform his master, that “ he purchased the “ meat from an infidel who is not a scripturist, and it was slain by “ one who was neither a scripturist nor a *Mussulman*,” it is in that case unlawful for the master to eat the flesh so purchased; for as the word of an infidel is credited with respect to the *legality* of meat, it is credited with respect to the *illegality*, in a superior degree.

A present may be accepted by the hands of a slave or an infant.

IF a slave, either male or female, or an infant, should carry something to a person, saying “ such an one has sent this to you as a present,” in that case the person may justly credit the information, as it is a frequent custom to send presents by such messengers. In the same manner, if either of these should intimate to a slave that his master had given him a licence to trade, he is allowed, accordingly, to accept of it; because it is perhaps impossible for them to bring witnesses to attest the intention of the master, whence, if their word were not credited, it would occasion an obstruction to business, and an unnecessary restraint amongst mankind.—It is related, in the *Jama Sagheer*, that where a slave girl comes to a person and says, “ my “ master has sent me as a present to you,” it is lawful for that person to accept of her.

The word of a reprobate

IN all temporal concerns the word of a reprobate \* may be taken;

\* Arab. *Fāṣik*, in opposition to *Adil*, a *just* or *upright* person.—The distinction between these terms has been fully explained elsewhere.

but

but in matters of a *spiritual* nature the word of an upright man only is to be credited. The reason of this distinction is, that affairs of a temporal nature are of frequent occurrence amongst every sect of men; whence if, in the transaction of them, any thing more than maturity of age and sanity of intellect (such as integrity, &c.) were required, it would occasion a restriction in business; to obviate which, the word of one person, in such case, is creditable, whether that person be virtuous or dissolute, a *Mussulman* or an infidel, a man or a woman. Concerns of a *spiritual* nature, on the contrary, are not of such frequent occurrence; hence it is requisite that in relation to them a greater caution be used. The word, therefore, of none but an upright *Mussulman*, is admissible in spiritual matters; because an unjust man lies under a suspicion of falsehood; and an infidel, as not following the LAW himself, has no right of enforcing it upon others. The case is different with respect to *temporal* matters; for an infidel is permitted to reside in a *Mussulman* territory purely on account of his temporal business, for which he would be incapacitated if his word in temporal matters were to be rejected. From this necessity, therefore, credit is given to it.—A person, also, whose character is unknown, is considered in the same light as an unjust man or reprobate; and his word relative to matters of faith is inadmissible. It is, however, related in the *Zâbir Rawâyet*, that *suspicion* and probable *conjecture* are the grounds on which it is lawful to determine in this point;—in other words, practice must accord with the conjecture which appears most probable or best supported. There is also another tradition from *Hanefa*, that the word of a person of unknown character may be believed in matters of a spiritual nature.

may be taken in all *temporal* concerns; but not in *spiritual* matters;

and the same of a person of *unknown* character.

THE word of a freeman or slave, whether male or female, is admitted in spiritual concerns, provided they be upright\*; for, in consequence of integrity, veracity preponderates; and this is a cause of

The word of an *upright* person, whether freeman or slave, may

\* Arab. *Adil*; in opposition to *Fâsik*.

be taken in  
spiritual mat-  
ters.

belief.—It is to be observed, that what was before related, of licencing a slave to trade, sending presents and messages, and the like, are of the class of *temporal* matters; as is also the investing of another with the power of agency.—Information, on the contrary, concerning the impurity of water (for instance) is a matter of a *spiritual* nature. In this instance, therefore, if the former be an upright *Mussulman*, the person who receives the information is at liberty, in performing his purification, to substitute sand for the water, in the manner of *teyummim*\*, and must not perform it with the water.—If, on the contrary, the informer be a profligate, or of unknown character, it is incumbent on the person who receives the information to consider the matter deliberately; when, provided he conclude the informer to be a person of veracity, he must perform *teyummim* instead of ablution.—(In this case, however, he should use the precaution of first pouring out a little of the water, and may then perform *teyummim*; whereas, if the informer be of an upright character, as there is in that case no suspicion of falsehood, the pouring out the water by way of precaution, is entirely unnecessary.)—If, on the contrary, the result of his reflection be that the information was false, he must perform ablution, but not *teyummim* with the water. This is what the law enjoins; but in this case also it is a requisite precaution that, after ablution, he perform *teyummim*, as the judgment he has formed in this case is entirely from conjecture. It is also to be observed that legality and illegality are considered as of a spiritual nature where they affect not the *property* of any person. Where, on the contrary, the testimony of one upright person tends to injure the property of another, it is not in such case of any weight;—as where, for instance, an upright person testifies that a certain person has married his own foster-sister; in which case his testimony is not creditable, as tending to hurt the property of the husband, inasmuch as he would be deprived of the effects of the woman, to which the marriage had entitled him;—or where a

\* For a further explanation of this, see Vol. I. p. 295.

person informs another, who had purchased a slave-girl, that she is his own foster-sister, or that she is a free woman.

If a person be invited to a marriage-feast, and, upon going there, observe the company to be engaged in wanton amusement, or in singing, still it is laudable in him to sit down and partake of the entertainment; for the acceptance of such invitation is strictly orthodox, as the prophet has said, "*whosoever refuses an invitation, is certainly not obedient to me.*"—He is not, therefore, to leave the entertainment on account of any irregularities committed by others; in the same manner as, at the ceremony of a funeral prayer, a person is not to absent himself, although people hired for the purpose of lamentation may there be present.—If, however, he have power to prohibit these irregularities, it is incumbent on him to exert it: but if he possess not such power, he must then remain with patience.—This is where the person invited is not a *Mooktiddâ*\*, or holy man; for, if such a person should be present and have it not in his power to restrain these irregularities, it is then incumbent on him to withdraw, as his presence in such a place shews a relaxation of religion. If, also, irregularities be committed during the time of eating, it is improper that any person should remain there, whether he be a *Mooktiddâ* or not; God having prohibited us, in the KORAN, from sitting in company with the wicked. All this proceeds on the supposition of the invited person being actually present at the marriage-feast, before he is aware of those irregularities; for if he be previously aware of such irregularities being practiced, it is incumbent on him to stay away, whether he be a *Mooktiddâ* or otherwise.

It is laudable to accept an invitation to a marriage-feast,—notwithstanding any irregularities which may be practiced there;

unless those irregularities be known before hand.

\* Literally, an *exemplary* person, as being eminent for sanctity of character,—whence the term is applied to priests, or other persons who exercise a holy office.—The *Persians* term such a person a *Peishwa*, or *one who leads the way*.

## S E C T. II.

## Of D R E S S.

*Women may dress in silk; but men must not,*

A DRESS of silk is not lawful for men; but women are permitted to wear it; for it is related by several of the companions of the prophet, of whom was *Alee* in particular, that one day the prophet appeared with a piece of silk in one hand, and of gold in the other, and said, “*Both these are prohibited to the MEN of my tribe, but are lawful to the WOMEN.*”

*farther than what is merely ornamental.*

A SMALL quantity of silk, such as three or four fingers breadth, used as a fringe or border to a garment, or applied to any such purpose, is allowable; because it is related that the prophet prohibited the wearing of silk, excepting a shred of the breadth of three or four fingers in a garment; and it is moreover related, that the prophet wore a robe with an edging of silk to it.

*A pillow of silk is allowable;*

ACCORDING to *Haneefa*, it is allowable to make a pillow of silk, and to sleep upon it. The two disciples, on the contrary, hold this to be abominable; and the same difference of opinion obtains concerning making curtains of silk, and hanging them upon doors. The arguments of the two disciples on this point are twofold. FIRST, the use of silk in general is proscribed by the prophet. SECONDLY, the making pillows and curtains of silk is a custom of the proud; and the imitation of such is forbidden.—The argument of *Haneefa*, on the other hand, is that the prophet sat upon a pillow of silk; and that there was one laid upon the sofa of *Abdoola Ibn Abbàs*.

It

IT is allowed to warriors, in the opinion of the two disciples, to wear a dress of silk or fatten in the time of war; because there is a tradition, recorded by *Shaaby*, that the prophet permitted the wear of silk during the time of battle. Moreover, it is in a manner necessary, as being best adapted to counteract the hard pressure of armour, and tending to excite horror in the eyes of the enemy. *Haneefa*, on the contrary, holds this to be abominable, because the traditions which point out its illegality are absolute, without distinguishing between any particular period or juncture, such as war, or the like; and the necessity may be answered in a dress of *Makhbloom*,—that is, having the woof of silk, and the warp of any thing else. Besides, silk, and every other thing that is proscribed, becomes allowable in no case but that of necessity;—and with respect to the tradition recorded by *Shaaby*, it alludes to a dress of *Makhbloom*. and a dress of silk to warriors.

A GARMENT of cloth, the woof of which consists of silk, and the warp of any thing else, such as wool or cotton, is allowable to wear during war, because of its being necessary: but it is abominated at any other juncture, because then there is no necessity for it. The same rule also obtains with respect to cloth of which the warp is silk and the woof wool or cotton; and for the same reason. or of mixed cloth.

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### S E C T. III.

#### Of ORNAMENTS.

MEN are prohibited from the use of ornaments of gold, such as rings, and the like, because of a saying of the prophet to that effect. Ornaments of silver are likewise unlawful; because silver is, in effect, the same as gold. An exception, however, is made with respect to Men are not to wear ornaments of gold or silver,



except on  
signet-rings,  
girdles, and  
swords.

signet-rings, girdles, or swords; the use of silver in ornamenting those being approved.—In the *Jama Sagheer*, it is related that *silver* rings only should be used; whence it may be inferred that rings of stone, iron, or brass, are forbidden. It is also related, that the prophet, on seeing a ring of brass upon the finger of a man, said, “*I perceive the smell of an image* ;” and again, that having seen, upon the finger of another person, a ring of iron, he spoke to him thus, “*I see upon your finger the ornament of the people of hell*.”—What is here said respects the circular hoop, and not the *setting* or *beazel* of the ring. Hence it is lawful that the setting be of stone. It is proper, however, that men, in wearing rings, turn the setting or beazel towards the palm of the hand, and women otherwise, because, with respect to them, rings are considered as ornaments.—Sovereigns and judges, moreover, wear rings, only as having occasion to seal with them; but with respect to other people, it is most adviseable that they never wear rings, as a like reason does not operate with them.

The setting  
of a ring may  
be of gold.

If a piece of gold be inserted in the setting of a ring, it is allowable; for, in that case, the gold is only a dependant on the ring, in the same manner as a shred of silk upon a garment.

Gold is not to  
be used in any  
cases of neces-  
sity, where  
silver will an-  
swer equally  
well.

It is forbidden, in the opinion of *Haneefa*, to bind the teeth \* with a thread of gold. *Mohammed*, on the other hand, maintains that this practice is unobjectionable. Of *Abou Yoosaf* there are two opinions recorded; one corresponding with the opinion of *Haneefa*, and the other with that of *Mohammed*. The two disciples, in support of their opinion, quote the case of *Arifja* the son of *Affad*, who, having lost his nose by a wound he received at the battle of *Goolab*, made a

\* This possibly means where a *supposititious* tooth is placed in the head to supply the loss of one.

false

false one of silver, which occasioning a very offensive smell, the prophet commanded him to make another of gold. The argument of *Haneefa* is, that gold is in its nature unlawful, whence the use of it is allowable only in a case of necessity; and as the necessity may in general be equally well answered by substituting silver, gold therefore remains subject to its original state [of prohibition:] this necessity, however, could not be answered, in the case of *Ariffá*, but by a substitution of gold, because of the silver occasioning a nauseous smell.

It is abominable in any person to clothe his infant child in a dress of silk, with ornaments of gold; for, since that dress is proved to be prohibited to men, they are consequently forbidden to dress others in it; in the same manner as it is unlawful to *give* wine to drink, because of the illegality of drinking it.

Infants must not be sumptuously apparelled.

THE custom of keeping handkerchiefs, as is frequently practiced, is abominable. Many, however, hold that it is allowable, if done from motives of necessity. This is approved; for the practice is abominable only when done ostentatiously, in the same manner as the mode of sitting with the knees on a line with the chin, and the hands folded round the legs\*.

Vain superfluities are not allowable.

It is allowable to bind the finger with a string, or a ring, with a view to aid the memory concerning some business relative to another person.

\* Meaning, that when a person sits in the manner so described, from ostentation, it is abominable, but that it is allowable when done with a view to obtain rest.

## S E C T. IV.

*Of the COMMERCE of the SEXES; and of looking at or touching any Person.*

Men must not look at strange women, except in the face, hand,

or foot.

It is not permitted men to look at strange women, except in the face, and palm of the hands, which is allowable, because women being frequently concerned in business with men, such as giving, taking, &c. it would therefore subject them to great inconvenience if these parts were veiled, whence there is a necessity for leaving them bare.—It is reported, from *Haneefa*, that it is allowable to look at the feet of a woman, because of there being sometimes occasion for it. From *Abou Yoosaf* there is a tradition that the seeing of the shoulder is likewise allowed; because that, from the influence of custom, it is left exposed. If, however, a man be not secure from the impulse of lust, it is not allowable to look even at the *face* of a woman, except in cases of absolute necessity.

A man (if young) must not touch a strange woman.

It is not lawful for a man to touch the hand of a strange woman, notwithstanding he have a controul over his lust; because the prophet has said, “*whosoever toucheth a strange woman, shall be scorched in the hand with hot cinders on the day of judgment.*”—This, however, proceeds on a supposition of the woman being young; for if she be old, insomuch as to be insensible to lust, in that case it is lawful to touch her at the time of salutation. The case is similar where the man, being old, is insensible to passion himself, and not such as to excite it in the woman he touches.

It

It is lawful to touch or look at a young girl insensible of the carnal appetite; as in that case there is no apprehension of seduction.

A female infant may be touched or looked at.

A KÂZEE may look in the face of a strange woman, when he passes a decree upon her, notwithstanding there be an apprehension of lust; because he is under a necessity of so doing, for the purpose of expediting his decrees, in order that the rights of mankind may sustain no injury.—Witnesses, also, are under the same necessity, in order to their giving evidence; and hence it is lawful for them likewise to look in the face of a strange woman, where they are desirous of giving evidence concerning her.—With respect, however, to looking merely *in order* to bear testimony, it is certain that this is not allowable where there is any apprehension of lust, since others might be found free from such influence; which argument does not apply at the time of *actually giving evidence*.

Rules to be observed by a magistrate with respect to women, when acting in his judicial capacity;—or by a *witness*.

A MAN may without blame look on a woman whom he has an inclination to marry, notwithstanding he knows that it will inflame his passion.

A woman may be looked at with a view to marriage.

A PHYSICIAN, in administering to a strange woman, is permitted to look at the part affected. It is, however, most adviseable that he instruct another woman how to apply the remedy, as the circumstance of an individual of one sex looking at another of the same is of less consequence. If he should not be able to procure a fit woman to instruct, it is in that case incumbent on him to cover all the members of the woman, leaving exposed only the particular part affected, when he may look towards it; refraining from it however as much as is possible, since any thing the sufferance of which is prompted by necessity, ought to be exercised with as much restriction as the circumstances of the case will admit.—In the same manner also, it is lawful for a man, in administering a glyster to a man, to look at the proper part.

Rules to be observed by a physician in prescribing for women.

A man may view or touch any part of another man, except his nakedness.

ONE man may, without blame, look at any part of another, except from beneath the navel up to the knee; because the prophet has said, "*the nakedness of a man is from the navel to the knee*;" and as, in another tradition, it is said, "*from beneath the navel*," it may thence be inferred that the navel is not included, but that the knee is so.—Still, however, in this a gradation is observed; for the exposure of the knee is of less consequence than that of the thigh, as on the other hand the exposure of the thigh is not so bad as that of the *positive* nakedness, or genitals; wherefore a person is to be reproved mildly when he leaves his knee bare; to be treated more harshly when he covers not his thigh; and, in the case of exposing his genitals, must be compelled by punishment to cover them.

EVERY part of a man, which it is proper for another to look at, may likewise, without blame, be touched by him; for the sight and the touch of those parts of a man which are not *nakedness* are considered in the same light.

A woman also, may look at any part of a man except his nakedness, (provided she be free from lust,)

WOMEN may lawfully look at a man, except in the space from the navel to the knee; provided, however, they be secure from lust; for men and women are considered as alike, in looking at parts not private, the same as in looking at a dress or a quadruped. (In the *Mabsoot*, under the head of *Hermaphrodites*, it is related that a woman looking at a strange man resembles a man looking at his female relation, in which case it is unlawful that he look at her back or belly\*, lest he thereby excite lust.)—If, however, a woman be enflamed with lust, or harbour a strong suspicion that looking at a man would create it, or be in any degree doubtful about it, in either of these cases it is most becoming that she shut her eyes, and avoid looking at a strange man; and if a man also be thus circumstanced, it is incumbent on him to close his eyes, nor must he look at a strange woman; because lust

\* The reason of this is explained hereafter.

having

having great power over women, is considered as always operating upon them; and when men are also subject to a passion of that nature, it exists then on the part of both; and this is a weighty reason for rendering their looking at each other illegal. It is otherwise where the woman is influenced and not the man, for then there is not an equally cogent reason to render it unlawful, one party only being in that case enflamed with lust.

A WOMAN is permitted to look at any part of another except from under the navel to the knee. This is according to one tradition of *Haneefa*; but according to another tradition, the looking of one woman at another of her sex, is the same as that of a man at his female relation; that is, they are not permitted to look at the back or belly. The first tradition is however the most authentic.

or at any such part of another woman.

It is lawful for a man to look at his slave girl in any part, provided she be not related to him within the prohibited degrees; and also at his wife in any part, even in the *pudenda*, if he please; because the prophet has said, “*shut your eyes from all excepting your wives and female slaves.*” Nevertheless, it is most becoming that a husband and wife should neither of them look at the genital parts of the other, as the prophet has said, “*when ye copulate with women of your own tribe, you must conceal as much as possible; and be not then naked, as that savours too much of the custom of asses.*”

A man may view his wife or his slave in any part.

It is lawful for a man to look at his female relation either in the face, head, breast, shoulder, or legs; for as it is usual with relations to visit one another without any previous intimation, and unattended with any retinue, and as women, in their house, generally wear a dress adapted to service, if, therefore, the sight of these parts were culpable, it would impose too great restraint upon them. It is different with respect to other parts; and hence proceeds the illegality of looking at the *back* or *belly*. (It is proper to observe that by the term

A man may look at the person of his kinswoman.

relation, [*Mubrim*,] as here used, is to be understood any person between whom and the beholder marriage is utterly and perpetually illegal, in consequence of affinity by either blood or marriage.)

Male and female relations may touch each other (if there be no apprehension of passion,)

EVERY part in a relation which it is lawful to look at may likewise be touched; unless, however, there be a dread of its enflaming the passion of either, in which case neither the sight nor the touch is approved.

or sit in private, or travel together.

THERE is no impropriety in a man sitting in private with his female relation, or travelling with her; because the prophet has said, “*No woman shall travel more than three days and three nights, unless accompanied by her husband, or her relation; and if, in this case, the woman should have occasion to mount upon, or descend from, a horse, the man may then, in assisting her, without blame, touch her back or belly, if covered, and provided he be sure of his passion; but otherwise he must beware of touching her.*”

A man may look at the female slave of another, in the same manner as at his kinswoman;

EVERY part which it is lawful for a man to look at in his female relation, may likewise be viewed by him in the female slave of another, whether she be an absolute slave, a *Modabbirah*, a *Mekâtibâ*, or an *Am-Walid*; for as a slave is necessitated to wear clothes adapted to servile employments, that she may discharge the business of her master, and attend upon his guests, her condition without the house is therefore the same, in relation to a stranger, as that of a free woman without the house, in regard to her kinsman.—With respect to privacy, or travelling with the female slave of another, many have said that it is allowed, in the same manner as in the case of a female relation.—Some, however, declare it improper, as not being justified by necessity. *Mohammed*, in the *Mabsoot*, has said, that the assisting of a female to ascend or descend from a horse is approved, provided it be in a case of necessity.

It

IT is permitted to a man to touch a female slave when he has an inclination to buy her, notwithstanding he may be apprehensive of lust. It is so related in the abridgment of *Kadooree*; and *Mohammed*, in the *Jama Sagbeer*, has given a similar absolute opinion in this case, without making any exceptions as to the circumstance of lust. The two disciples, on the other hand, maintain that although, on account of necessity, it be proper for a person to *look* at a slave girl when he is about to purchase her, notwithstanding it may be the means of inflaming his passion, still it is improper to *touch* her when under the impulse of passion, or where there is a probability of its being excited. In case of an exemption from passion, however, they hold it allowable either to touch or look at her.

and may also touch her with a view to purchase.

WHEN a female slave arrives at maturity, it is improper to leave her in *drawers* only: on the contrary, it is requisite that she have two clothes, in order that her back and belly may be covered, as these, with regard to her, may be considered as privy parts. It is moreover reported, from *Mohammed*, that when a female slave reaches the age of puberty, she must not be exposed in *drawers* only, as that may occasion lust.

An adult female slave must be put in a decent habit.

A *KHASEE*, or *simple* eunuch, is considered in the same light with a man, whence any thing prohibited to a man is so likewise to him, for he possesses virility, and is not disabled from copulation; and the same, also, of a *Majboob*, or *complete* eunuch; for he is likewise capable of friction, and has the power of passing semen; and so likewise of an hermaphrodite, as he is merely a defective man.

An eunuch or hermaphrodite are the same as a man with respect to those rules.

IT is not lawful for a male slave to view his mistress, except in the face, or palm of the hands, in the same manner as a stranger's. *Malik* maintains that a slave is in the predicament of a kinsman within the prohibited degrees; (and such also is the opinion of *Shafëi*;) because his mistress is subject to his entering her apartment frequently with-

A male slave must not view his mistress but in the face, or hands.



out intimation. The arguments of our doctors are, that the slave is a man neither related to her as a kinsman nor husband; that he is liable to be influenced by a passion towards her, as marriage may eventually be lawful between them; (that is, in case of his emancipation;) and that there is no necessity for his approaching her without leave, as the business of a slave properly lies without the house.

A man may gratify his passion with his female slave in whatever way he pleases.

It is lawful for a man to perform the act of *Azil*\* with his female slave without her consent, whereas he cannot lawfully do so by his wife, unless with her permission.—The reason of this is that the prophet has forbidden the act of *Azil* with a free woman without her consent, but has permitted it to a master, in the case of his female slave. Besides, carnal connexion is the right of a free woman, for the gratifying of her passion, and the propagation of children, (whence it is that a wife is at liberty to reject a husband who is an eunuch or impotent,) whereas a slave possesses no such right.—A man, therefore, is not at liberty to injure the right of his wife, whereas a master is absolute with respect to his slave.—If, also, a man should marry the female slave of another, he must not perform the act of *Azil* with her without the consent of her master.

\* For a definition of *Azil*, see Vol. I. p. 167.

SECT. V.

Of ISTIBRA, or waiting for the PURIFICATION of WOMEN\*.

A MAN, when he purchases a female slave, is not permitted either to enjoy her, or to touch, or kiss her, or look at her *pudenda*, in lust, until after her *Istibra*, or purification from her next ensuing courses; for when the captives taken in the battle of *Autâs* were brought thence, the prophet ordained that no man should have carnal connexion with pregnant women until after their delivery, or with others until after one menstruation; which evinces that the abstinence so enjoined is incumbent on a proprietor; and further, that the occurrence of right of property and of possession is the occasion of its being incumbent. The end proposed in this regulation is, that it may be ascertained whether conception has not already taken place in the womb, in order that the issue may not be doubtful.

A man must not have connexion with his purchased female slave until one term of her courses have elapsed:

ABSTINENCE until after purification is incumbent on the *buyer*, but not on the *seller*; for the true reason of its necessity is the desire of copulation; and as the buyer is presumed to possess this desire, and not the seller, the observance of it is therefore enjoined him, and not the other. If, moreover, desire be an internal operation of the mind, the obligation of the law, in this particular, rests upon the *argument*

but this rule operates only on the *purchaser*, not on the *seller*.

\* A phraseology runs throughout this section which renders the translation of it into *English* particularly difficult, as the precise meaning of the term *Istibra* cannot be expressed by any single word in our language.—The best *Arabic* lexicons define *Istibra* to signify “the purification of the womb.”—The term, however, must here be received in a more involved sense; for *Istibra* does not, in fact, mean simply *purification*, but a *desire* of, or (as rendered in the text) a *waiting for* purification; for which reason the translator renders it *purification*, or *abstinence*, as best suits the context.

of such desire. Now the mere *power* of committing the carnal act is an argument of the desire for such act; and as this power is established only by property and possession, it follows that property and possession are the occasions of this obligation of abstinence.—This law, therefore, extends to a right of property, in all its different modes of being acquired, such as by purchase, donation, legacy, inheritance, covenants, &c. whence it is that this abstinence is enjoined upon a person, who buys a female slave, either from an infant, or a woman, or from a slave licenced to trade\*, or from a person who is by law prohibited from having any carnal connexion with her. In the same manner, also, this abstinence is incumbent where a person buys a female slave who is a virgin; for the law proceeds according to the proof of the cause which prompted it, and not according to the proof of the propriety or expediency, as these relate to what is internal and unknown.

In the purchase of a *menstruous* female slave, the purchaser must wait for another complete term.

If a person purchase a female slave during her menstruation, no regard is paid to this menstruation with respect to determining the abstinence†. In the same manner, also, no regard is paid to a menstruation which occurs between the time of taking possession and the time of the right of property being established, by purchase, or the like;—and so likewise, regard is not paid to the delivery of a female slave between the establishment of a right of property in her, and the act of taking possession,—(contrary, however, to the opinion of *Abou Yoozaf.*)—The reason of this is, that the occurrence of right of property and possession is the *cause* of purification being required; and the obligation of observing the purification is an *effect* of property and possession; and the *effect* cannot take place before the occurrence of the *cause*. The same rule holds with regard to such menstruous purga-

\* The slave licenced to trade is, in this case, supposed to have been prohibited from cohabiting with the slave, as the goods he sells or purchases are presumed to be the property of another, namely, his master.

† Arab. *Fee bâbal Istibrâ;* (literally) “*in point of purification,*”—meaning that purification requisite to determine the abstinence imposed on the purchaser of a female slave.

tions,

tions as may happen previous to the procuring of sanction, in the case of an unauthorized sale of a female slave, notwithstanding the purchaser may be seized of her;—and so likewise, where the courses happen after the seizure in the case of an illegal contract of sale, and before the slave is purchased by a valid contract; for in none of all these cases do the present courses determine the abstinence.

ABSTINENCE is requisite in the case of a *partnership* female slave, where one of two partners purchases the other's share; for here the *cause* is complete, and upon the completion of the *cause* the effect takes place.

A person purchasing his partner's share in a female slave must wait until her next purification.

IF a person purchase a *Magian* female slave, or receive her in donation, and she, after his taking possession of her, have her courses, and then become a *Muslimá*,—or, if a person purchase a female slave, and make her a *Mokátibá*, and she, after his taking possession of her, having voided her courses, prove unable to discharge her ransom,—such courses are sufficient to establish the requisite purification, in either of these cases, as having happened after the occurrence of the *cause* for waiting, namely, right of property and possession.

Other rules to be observed respecting female slaves.

IN cases where a female slave, having eloped, returns to her master,—or, having been taken away, or hired out, is restored,—or, having been pawned, is redeemed,—abstinence is not requisite, for the cause of it (namely, the acquisition of property and possession) does not exist in either instance.

IN every case where abstinence is enjoined, and carnal connexion prohibited, all sorts of allurements and dalliance, such as kissing and hugging, are likewise prohibited, as these lead to the commission of unlawful acts. Add to this, the possibility of their being committed on the property of another, as may happen if the slave prove with

Where the carnal act is unlawful, all incentives to it are prohibited.

child and the seller lay claim to her. (It is reported from *Mohammed* that dalliance with a *captive* slave-girl is lawful.)

Pregnant women are purified by delivery, and immature females by the lapse of one month.

THE purification of a pregnant female slave is established by her delivery, and that of a girl in whom the menses have not yet appeared, by the lapse of a month, that space being, with respect to such an one, a substitute for the courses, in the same manner as holds in the case of a woman under *Edit*\*. If, however, the menstrual blood should discharge itself *before* the expiration of the month, the purification by lapse of time is annulled, because of the ability with respect to the *original* circumstance, prior to accomplishing the object of the *substitute*.

Rule respecting adult females not subject to the courses.

IF the courses be delayed in a female slave who is of age to be subject to them, it is in that case requisite to refrain from any carnal connexion with her, until it appear that she is not pregnant, when it becomes lawful to cohabit with her. (This opinion is quoted from *Haneefa*, in the *Zâbir Rawâyet*, without specifying any particular term.)

Devices used to elude the abstinence required;

It is allowable, according to *Aboo Yoosaf*, to elude the abstinence by the practice of a device; in opposition to the opinion of *Mohammed*. The arguments of each on this point have been already detailed under the head of *Shaffa*.—The opinion of *Aboo Yoosaf* has been adopted by *Kâzees* in their decisions, where it has appeared that the seller had not cohabited with the slave from the period of her courses antecedent to the sale;—and, according to the opinion of *Mohammed*, when the contrary has been proved. The device which may be practiced in a case

\* See *Edit*, Vol. I. p. 360.—There seems here to be a small mistake in the text, as the *Edit* of a female slave not subject to the courses is determined by the lapse of a *month and an half*.

where

where the purchaser is not married to a free woman \*, is that he may first *marry* the slave, and then purchase her †.—If, on the contrary, he be already married to a free woman, the device in that case is that the seller, previous to the sale, or the purchaser, before taking possession, give the slave in marriage to another person, (who must, however, be one in whom they can confide, that he will not cohabit with her, and that he will divorce her,) and then, that the party *purchase* the slave, in the former instance, or take possession of her, in the latter,—and the husband divorce her;—because as the purchaser was at any rate prohibited from cohabiting with the slave at the time when the cause of abstinence first operated, (that is, when he first acquired property and possession,) no abstinence is therefore required after she *did* become lawful to him, as regard is paid to the time and circumstances under which the cause takes place;—in the same manner as where a person purchases and takes possession of a slave who is in her *Edit*,—in which case, upon the expiration of the term of *Edit*, abstinence is no longer required, since in this case the slave was not lawful to the purchaser at the time of the *cause* taking place.

It is not lawful for a person who has given abusive language to his wife ‡, either to look at her *pudenda* in lust, or to cohabit with her, or to kiss or touch her, until such time as he have performed expiation; because, as it is unlawful for him to copulate with her until after expiation, it is, consequently, unlawful that he enter into dalliances with her, since the *cause* of an illegal act is likewise illegal;—in

A person pronouncing *Zihâr* must entirely abstain from his wife until he have made expiation.

\* This condition is here made, because it is not lawful for a *Mussulman* to marry a slave if he should be previously married to a free woman. (See Vol. I. p. 86.)

† It is here understood that marriage exempts from abstinence.

‡ Literally, “it is not lawful for a *Mozâbir*,”—meaning a person who has pronounced a sentence of *Zihâr* upon his wife. (This whole passage will be better understood by a reference to *Zihâr*, Vol. I. p. 326.)

the same manner as holds in cases of *Ytikâf*\* and *Ibrâm*†; or where a person, by mistake, cohabits with the wife of another,—in which case she must observe an *Edit*; during which, as it is unlawful for the husband to have connexion with his wife, so it is likewise unlawful for him to use any of its incentives with her. It is otherwise during the courses or fasting, for, although copulation be at such time prohibited, yet dalliance is lawful, because the courses are frequent and of long continuance, engrossing a great part of life, as they happen once every month, and continue ten days every time;—and, in the same manner, the days of fasting are protracted to one month by the divine ordinances, and (among pious persons) voluntarily occupy a considerable part of life;—whence if dalliances were forbidden during those terms, it would tend to restrain men too much in their enjoyments.

A person indulging in wantonness with two female slaves who are sisters, must put one of them away before he can have connexion with the other.

If a person, incited by passion, should kiss two female slaves who are sisters, he is not in that case permitted to have carnal connexion with either of them, or to kiss, touch, or look at the *pudenda* of either in lust, until he render one of them unlawful to him, either by making her the property of another, in whatever manner he may choose, or by giving her to another in marriage, or by emancipating her; because it is not lawful either to copulate or to enter into dalliances (such as kissing and hugging) with two sisters. But whenever one of them is rendered unlawful, the enjoyment of the other is permitted to him.—(The transfer of a part of the slave, in this instance,

\* *Ytikâf* is a religious austerity practised by the most pious of the *Mussulmans* in the last ten days of the month of *Ramzan*; they remain during that period in a mosque, without ever departing from it but when the calls of nature absolutely force them, abstracting themselves at the same time from all enjoyments.

† *Ibrâm* is the period during which the pilgrims remain at *Mecca*.—They are then subject to a number of strict regulations, and are particularly enjoined to refrain from all worldly pleasures.

is

is the same as a transfer of the whole, with respect to the illegality of enjoyment \*; and so likewise the emancipating her, or rendering her a *Mokútibá* in part.) If, on the contrary, he let one of them to hire, or pawn her, or create her a *Modabbirá*, the other is not thereby made lawful to him, as he does not by any of these acts relinquish his property in her. If, also, he should give one of them in marriage to any person by an invalid contract, he does not thereby acquire a right to enjoy the other; unless, however, the husband of that one consummate the marriage, in which case an *Edit* is incumbent upon her, and this is the same as a valid marriage, with regard to rendering the enjoyment of her illegal. If, also, he once carnally enjoy one of them, he may afterwards continue to do so;—but he cannot then lawfully have connexion with the other; for if so, it would be a connexion with two sisters, which is unlawful; but this consequence is not induced by connexion with one of them.

ANY two women who are related to each other in a degree that prevents their being lawfully married to the same person, are considered as sisters, and are consequently subject to the rules exhibited in the preceding case.

It is abominable for one man to kiss another either in the face or hand, or on any other part; as it is likewise for two men to embrace each other. *Tabávee* reports that this is the opinion of *Haneefa* and *Mohammed*; but that *Aboo Yoosaf* holds it not improper for a man either to kiss or embrace another; because it is related that when *Jaffier* came from *Abyssinia* the prophet embraced him and kissed him between the eyes. The argument advanced by *Haneefa* and *Mohammed* is a tradition that the prophet prohibited both kissing and embracing; and

Men must not  
kiss or embrace  
each other:

\* That is to say, he will as completely render one of the sisters illegal (or forbidden) to him (and consequently legalize his connexion with the other) by selling or otherwise transferring his property in a *part* of her, as by so transferring her *in toto*.

with



with respect to the circumstance adduced by *Aboo Yoosaf*, it must be construed as having happened prior to the prohibition. The learned, however, have said that this disagreement between our doctors concerning the act of embracing, respects only a case where men are not properly dressed, as where, for instance, they are in *drawers* only; but that those acts are allowable, in the opinion of all our doctors, when the parties are clothed with an under and upper garment.—This is the most approved doctrine.

but they may  
join hands.

THE joining hands by way of salutation is allowable; for the prophet has said, “*Whosoever joins his hand to that of his brother Muslim, and shakes it, shall be forgiven of his sins.*”

## S E C T. VI.

### *Of the Rules to be observed in SALE.*

*Dung* may be  
fold; but not  
human excre-  
ment,

unless mixed  
with mud.

THERE is no impropriety in the sale of dung; but it is abominable to sell human excrement. *Shafëi* maintains that the sale of dung is likewise abominable, because of its being actually filthy; in the same manner as excrement, or the undressed skin of a dead animal.—The argument of the *Haneefites* upon this point is, that dung is capable of yielding profit, as it is commonly strewed upon land, in order to render it more fertile; and as it thus yields a profit, it is therefore a valuable *property*, the sale of which is lawful. It is otherwise with respect to excrement, as that is incapable of profit, unless it be mixed with

with mud, when the sale of it becomes lawful \*, according to what is reported from *Mohammed*; which is approved.

IF a person see another selling a female slave, he at the same time knowing her to be the property of some other person, and he be informed by the feller that “ he has been empowered by that other to “ dispose of her,” it is in that case lawful for him to purchase her, and have carnal connexion with her; because the word of one man, although he be not *upright* †, may be received in temporal matters, provided there be no opponent to shake the credit of his testimony.—The same rule also holds if the feller allege that he had received her in donation from the other, or that he had bought her from him; with this difference, however, that he is here required to be of an upright and trustworthy character;—and so likewise if he be *not* trustworthy, provided the purchaser believe that he speaks truth; but if he disbelieve him, it is not lawful for him to purchase the slave. The law is the same, if the purchaser, not having previously known the female slave, be informed by the seller, that “ she is the property of another, “ who has empowered him to sell her,”—or that “ he has purchased “ her from such a person.”—If, on the other hand, knowing her to have been in the possession of another, he do not receive any information from the seller, he cannot in that case lawfully purchase her until he know by what means the seller has acquired a property in her; for her having been in the possession of another is an argument of her being the property of another. If, on the contrary, he should not know her to have been before the property of another, he may then lawfully purchase her, notwithstanding the seller bear a bad character; because possession, even with an *unjust* man, argues property; and suspicion, or probable conjecture, lose all force in any case where a legal argument can be urged. Where it is evident, however, that a person

A person may purchase and have connexion with a female slave on the faith of the seller's assertion respecting her;

\* Because in this case the *mud* or *manure* is the article sold, the ordure being merely a dependant.

† Arab. *Adil*, in opposition to *Fâsik*.

of

of such appearance as the seller is not likely to be the proprietor of her, it is most prudent on that account to avoid buying her. Nevertheless, if the purchase be made, there are hopes of its being lawful, because of its being supported by a legal argument.

but if the seller be a *slave*, precaution must be used.

If the person who offers the female slave to sale be a slave, male or female, in that case the other must neither accept nor purchase her until he enquire into the circumstances; because, as *property* cannot be a *proprietor*, it is evident that some other is the proprietor of her. If, however, the seller inform him that "his master had licenced him to sell her," his word may in that case be taken, provided he be upright and trustworthy: but if he be otherwise, the purchaser must be guided by probable opinion; and if he have not the means of forming any opinion of him, whether good or bad, he must not in that case purchase her, or admit his allegation concerning her.

A woman may marry (after observing her *Edit*) on receiving authentic information of her widowhood or divorce.

If a person of an upright and trusty character inform a woman that her husband who was absent had died, or that he had divorced her thrice,—or, if a person of a *reprobate* character deliver her a letter from her husband, wherein he acquaints her of his having divorced her, and she, not knowing for certain that the letter was written by her husband, should however be led to think so,—in either of these cases she may lawfully observe her *Edit*, and then marry;—because in this instance a circumstance destructive of the former marriage has occurred without any person appearing to contradict it. In the same manner, also, if a woman inform a man that her husband had divorced her, and that the stated period of her forbearance had elapsed, the man may lawfully marry her. If, also, a woman inform her former husband who had divorced her thrice, that "after the lapse of her *Edit* she had married another, with whom she had cohabited, and that having divorced her she had again completed her *Edit* from that divorce," the first husband may in that case lawfully marry her

her again. The law is also the same where a woman informs a person that, having been a slave, she had received her freedom.

IF a person inform a woman that her marriage had been originally unlawful, inasmuch as her husband was at that time an *apostate*, or her *foster-brother*, his word is not in that case to be credited, unless confirmed by the evidence of two men, or of one man and two women. So likewise, if a person inform another that his wife had been an apostate at the time of marriage, or that she is his foster-sister, he is not in that case permitted either to marry the sister of that woman, or to marry other four women, until the information so given be fortified by the attestation of two upright men. For here the husband is informed of an illegal circumstance coexistent with the marriage; whereas his execution of the contract of marriage is an argument in favour of its validity, and a denial of its illegality; and hence the information of the other is apparently contradicted. The case is otherwise, however, if a person, having married a child, should be informed that she had afterwards sucked the milk of his mother or sister; for the information so given is to be believed, since here the bar to the marriage is subsequent to, and not co-existent with, the contract; and the execution of the contract, being antecedent to the circumstance of its illegality, does not therefore afford any proof of its non-existence; whence the information is not controverted.

Information tending to annul a marriage, must not be credited unless supported by testimony.

IF a girl, so young as to be unable to give any account of herself, being in the possession of a man who asserts her to be his property, should be afterwards, when she arrives at the age of maturity, met in another city by a man who formerly knew her, and tell him that "she is a free woman," he is not, on the strength of her word, permitted to marry her, as there is an argument against the truth of it, namely, her having been in the possession of another.

A man is not at liberty to marry a female slave on her informing him that she is free.

A *Mussulman* is not allowed to pay his debts by the sale of wine; but a *Christian* may pay his debts in this manner.

If a *Mussulman*, involved in debt, should sell wine, it is abominable in his creditor to receive payment in the money so obtained; whereas, if the debtor were a *Christian*, it would be allowable so to do. The reason of this distinction is, that in the former instance the sale was invalid, as wine is not valuable to *Mussulmans*, and the price of it being therefore the property of the purchaser, cannot be lawfully received in payment. In the latter instance, on the contrary, the sale was lawful, wine being a valuable commodity amongst *Christians*; and as, consequently, the price of it is the property of the seller, the discharge of a debt from such price is lawful.

It is abominable to monopolize the necessaries of life; or to forestall the market:

It is abominable to monopolize \* the necessaries of life, and food for cattle, in a city where such monopoly is likely to prove detrimental. So likewise is it abominable to forestall †; as where people leave a city to meet a caravan with a view to purchase goods and lay them up. This, however, is immaterial, when it tends not to the injury of any one. The argument, in this case, is a tradition of the prophet, who said "*Blessed is the JÂLIB, and accursed is the monopolizer.*" (By *Jâlib* is to be understood a merchant who brings camels, goats, and so forth, for sale.) Another argument is, that grain is connected with the rights of every one, whence the withholding it from sale is an invasion of the general rights of mankind, and an occasion of scarcity in their necessary food. Such an act is therefore abominable where the effects of it are extended to the people; as is the case when the monopoly is made in a small city. It is otherwise, however, where it carries not along with it any sensible detriment to the people, as where it is done in a *large* city. The law is similar in the case of forestalling. The learned, however, remark that

\* Arab. *Ihtikâr*. It is explained in the text to signify, in its literal sense, the laying up of any thing; and in the language of the LAW, the purchasing of grain, or other necessaries of life, and keeping them up with a view to enhance the price.

† Arab. *Talâkkee*.

this is where the purchasers neither conceal from the merchants the price current of the market, nor deceive them in it; for if they either conceal or deceive them in the established prices, the anticipation of the market is in such case abominable, whether it be hurtful in its consequences or otherwise. The restriction of the term *Ibtikâr*, or monopoly, to the necessities of life and the food of animals is according to *Haneefa*. *Abou Yoosaf* has said that the hoarding of any thing, the detention of which from circulation produces bad consequences, although it be such articles as gold, silver, or cloth, comes equally within the definition of a monopoly. It is reported from *Mohammed*, on the contrary, that the withholding of cloth from the market does not constitute a monopoly. It therefore appears that, according to *Abou Yoosaf*, regard is paid to the *actual* detriment in determining the monopoly, as that is the cause of its being abominated; whereas, according to *Haneefa*, regard is paid to the *particular* detriment. Decrees pass according to the latter opinion. It is to be observed that, if the period of detention be short, it is not a monopoly, as not being then attended with any detriment. If, on the contrary, the period be long, it becomes an abominable monopoly, as it then induces detriment. Some have said that by a *long* period is to be understood at least forty days, because of a saying of the prophet, "*Verily, whosoever hoards victuals for the space of forty days is at variance with God, and God is at variance with him.*" Others have said that a *month* is a long space, and that any time less is a *short* space; and that the degree of guilt rises in proportion to the necessities of the people, and the effect of the monopoly in producing a famine. Others, again have said, that although there be a fixed period for rendering it punishable in this world, still it is criminal, however short the period may be. In short, it is not good to trade \* in grain, or commodities of that nature.

\* By trading is not here to be understood simple purchase and sale, but the usual practice of merchants in keeping up their commodities, and watching the turns of the market, in order to sell to the greatest advantage.

but a person may monopolize the product of his own grounds, or what he brings from a distant place.

If a person should hoard a quantity of grain, being the product of his own cultivation, or which he had brought from another city,—in either of these cases it is not deemed an abominable monopoly:—it is not so in the first case, because such product being an unmixed right of his own, without any relation to that of other people, he is therefore permitted to hoard it up; and in the same manner as it is lawful for him not to cultivate the seed, so is it lawful for him not to sell the product:—nor is it so in the second case, according to the opinion of *Haneefa*, the reason in support of which is, that the rights of the people extend only to what is collected in the city, or what is brought thither from its dependances. *Abou Yoosaf*, on the contrary, deems this practice abominable, because the tradition recorded on this head is absolute. *Mohammed*, also, has said that every place from which grain is frequently brought to a particular city may be deemed a dependancy of it; and that a monopoly of whatever may be brought from such places is forbidden, as the rights of the people are connected with it. It is otherwise, however, where goods are brought from a *distant* place, such as it is not customary to bring them from; since in that case the rights of the community are not concerned.

Sovereigns must not fix prices,

except in cases of necessity.

It is not the duty of sovereigns to establish fixed prices to be paid by the community; because the prophet has forbidden this, saying “*Establish not prices, as these are regulated by God.*” Besides, the price is the right of the merchant, and the measure of it is therefore left to him; and sovereigns are not entitled to invade any such right, except where the welfare of the community is concerned, as shall presently be made appear.

A monopolizer, upon information, must be required to sell his superfluous provisions.

If a person guilty of a monopoly be brought before the *Kâzee*, he must direct him to sell whatever he may have laid up more than is amply sufficient for the subsistence of himself and family, and must prohibit him from the like practice in future;—and if, after this, he should

should again monopolize, the *Kázee* may then chastise him at his own discretion.

If victuallers, taking advantage of the necessity of the people, raise the market to an exorbitant rate, and the *Kázee* be otherwise unable to maintain the rights of the people, he may in that case regulate the prices, with the assistance of men of ability and discernment.—Notwithstanding this, however, if they should continue to sell their grain at a rate exceeding the fixed standard, the *Kázee* must confirm the sale, nor has he the power of annulling it. This, according to *Haneefa*, is evident; for he holds it unlawful to inhibit a freeman in this respect;—and so likewise, according to the two disciples, unless the inhibition affect only some particular people, since (agreeably to their tenets) inhibition is not allowed where it is indefinite.

A combination to raise the price of provisions must be remedied by the magistrate fixing a rate.

Is it lawful for a *Kázee* to sell the grain of a monopolizer without his consent?—Some say that upon this point there is a diversity of opinion, in the same manner as in the case of selling the effects of a debtor;—whilst others maintain that it is lawful in the opinion of all our doctors, because *Haneefa* holds it just to inhibit a freeman, with a view to removing a common evil, as is the case in the present instance.

It is abominable to sell arms in the time of sedition to a person whom the seller knows to be a rebel, as this is a cause of evil. If, however, the seller should not know the purchaser to be engaged in the rebellion, he may then without blame sell arms to him.

Arms must not be sold to seditious persons.

THERE is no impropriety in selling the juice of dates or grapes to a person whom the seller may know intends making wine of it; for the evil does not exist in the *juice*, but in the liquor, after it has been essentially changed. The case is different with respect to selling arms

The crude juice of fruit may be sold for the purpose of making wine.

at



at a time of tumult, since in that instance the evil is established, and exists in the original thing, arms being the instruments of sedition and rebellion.

A house may be let to hire any where out of a city for the purpose of a pagoda or a church.

If a person let a house to hire in a village, or in the neighbourhood of a city, in order that the lessee may convert it into a *pagoda*, or a Christian church, or that he may sell wine in it, it is immaterial, according to *Haneefa*. The two disciples hold such lease to be improper, as tending to promote sin. The arguments adduced by *Haneefa* are, that the compact is formed with a view to obtain profit from the house, which becomes due immediately upon the delivery; that the guilt exists only in the act of the lessee; and that, as he is a free agent, no crime of his can therefore be reflected upon the lessor. The reason of restricting the place, in this instance, to a village, or the neighbourhood of a city, is because it is illegal to let out a house in a city for any of the abovementioned purposes, as there the light of the *Mussulman* religion is supposed to blaze, which is not always the case in other places. The learned, however, have said, that this refers only to the neighbourhood of *Koofa*, because many infidels reside there: but that in any other place where the *Mussulman* religion prevails it is unlawful. This latter opinion is the most authentic.

A *Mussulman* may carry wine for an infidel, and receive wages for so doing.

If an infidel hire a *Mussulman* to carry wine for him, and afterwards pay him for his labour, the money so obtained is lawful to the *Mussulman*. The two disciples have said that it is abominable, as being the instrument of sin, and likewise because the prophet (according to the *Rawâyet Sabeeh*) has denounced curses upon ten several people who are concerned in wine, amongst whom are they who carry it. The argument of *Haneefa* is, that the sin lies only in the drinking of it, which is the act of a free agent; that the carrying it is no ways allied to the drinking of it; and that the object of the porter is not that another should drink it, but only that he himself should obtain

obtain the reward of his labour:—and with respect to the tradition above alluded to, it refers only to a case where the wine is carried with intent to promote sin.

THERE is no impropriety in the sale of the walls of the houses at *Mecca*, but it is abominable to sell the ground on which they stand. This is the opinion of *Haneefa*. The two disciples have said that the ground of *Mecca* may likewise be sold; and it is also related that *Haneefa* accorded in this opinion; because in the same manner as the houses are property, so likewise is the ground. The real opinion of *Haneefa*, however, is that it is improper; because the prophet has said, “*MECCA is sacred, and the houses there can neither be sold nor inherited.*” *Mecca*, moreover, is sacred, as being a dependancy of the *Kàba*, and the place where reverence is particularly shewn to it; whence it is not lawful either to hunt at *Mecca*, or to cut the thorns or grass which grow there, (except when they have faded and become parched;) or to shake the leaves off the trees growing there.

Rules respecting the ground and houses at *Mecca*.

It is abominable to let the ground at *Mecca*, because the prophet has said, “*Whosoever hires out the ground of MECCA is guilty of usury: whoever has use for the ground at MECCA, let him reside in it; and whoever possesses more than is sufficient for his own purposes, let him bestow it upon others.*”

If a person take from a merchant something he may have occasion for, and leave with him a certain number of *dirms* (for example) he is guilty of an abomination; because, in thus taking what he wants, he derives an advantage from a *loan*, (namely, the money he leaves with the merchant;) and the prophet has prohibited us from taking interest on loans. He must therefore first deposit the *dirms* with

Implied usury is abominable.

with the merchant, and then take from him whatever he may want; as the money is in this case a *trust*, and not a *loan*, inasmuch that the merchant is not subject to pay a compensation in case of the loss of it.

## S E C T. VII.

## MISCELLANEOUS CASES.

The KORAN ought to be written without marks or points.

It is abominable to distinguish the sentences of the KORAN with marks, or to insert in it the points or short vowels. Nevertheless the learned amongst the moderns have said that these distinctions are proper when made for the use of a foreigner.

Infidels may enter the sacred mosque.

THERE is no impropriety in a *Polytheist*\* entering the sacred mosque†. *Shafëi* held this to be abominable; and *Mâlik* has said, that it is improper for such to enter into any mosque.—The argument of *Shafëi* in support of his opinion is, that God has said in the KORAN, “ASSOCIATORS ARE IMPURE, AND THEREFORE MUST NOT BE PERMITTED TO ENTER THE SACRED MOSQUE.” Another argument is, that an infidel is never free from impurity, as he does not perform ablution in such a manner as to work a purification; and an impure man is not allowed to enter into a mosque. The same arguments have been urged by *Mâlik*; but he extends them to any mosque. The argument of our doctors on this point is drawn from a tradition that the prophet lodged several of the tribe of *Sakeef*, who

\* Arab. *Mushbirrak*, i. e. an *associator*, including all who deny the unity of the God-head, and therefore applying to [trinitarian] *Christians* as well as to *Idolaters*.

† This is a mosque in *Mecca*, so called because the prophet most frequently offered up prayers in it.

were

were infidels, in his own mosque. Besides, as the impurity of an infidel lies in his unbelief, he does not thereby defile a mosque. With respect, moreover, to the text above quoted, it merely alludes to infidels entering a mosque in a haughty and forcible manner, and to a custom which was practiced in the days of ignorance of walking about the mosque naked.

It is abominable for a *Mussulman* to keep *eunuchs* in his service, as the employment of them is a motive with men for reducing others to a like state, a practice which is proscribed in the sacred writings\*.

It is abominable to keep eunuchs.

It is not abominable to castrate cattle, or to make a horse copulate with an ass, as these tend to the benefit of mankind. Besides, it is related, in the *Nakl Sabeeh*, that the prophet rode upon a mule, which, if such promiscuous procreation of animals had been prohibited, he would never have done, as thereby a door would have been opened to sin.

It is allowed to castrate cattle.

THERE is no impropriety in visiting a *Jew* or *Christian* during their sickness, as this affords them a kind of consolation; and the LAW does not prohibit us from thus consoling them. Nay, we are told, in the *Nakl Sabeeh*, that the prophet visited a *Jew* who lay sick in his neighbourhood.

A *Jew* or *Christian* may be visited during sickness.

It is abominable that a person, in offering up prayers to God, should say, "I beseech thee, *by the glory of thy heavens!*" or "by *the splendor of thy throne!*" for a stile of this nature would lead to suspect that the Almighty derived glory from the heavens; whereas

Vain invocations in prayer not allowed.

\* That is, in the KORAN, which is termed, by way of pre-eminence, the *Sharra*, or LAW.

the heavens are created, but GOD, with all his attributes, is eternal and immutable. It is, however, recorded by *Abou Yoozaf*, that there is no impropriety in this, (an opinion which has been likewise adopted by *Abou Lais*,) because it is related of the prophet that he offered up a similar prayer to GOD. Our doctors, on the other hand, have urged that this tradition is uncertain; and that to abstain from whatsoever is *suspected* of being wrong is most prudent and advisable.

It is abominable to say, in a prayer, “ I beseech thee, O GOD, “ *by the RIGHT of*” (any particular person,) or “ *by the RIGHT of*” (any of the prophets;) because none of his creatures is possessed of any right with respect to the Creator.

Gaming is dis-  
allowed.

It is an abomination to play at chess, dice, or any other game; for if any thing be staked it is *gambling*, which is expressly prohibited in the KORAN; or if, on the other hand, nothing be hazarded, it is useless and vain. Besides, the prophet has declared all the entertainments of a *Mussulman* to be vain excepting three; the breaking in of his horse; the drawing of his bow; and the playing and amusing himself with his wives. Several of the learned, however, deem the game of chess to be allowed, as having a tendency to quicken the understanding; which opinion has also been ascribed to *Shafei*.—Our doctors have founded their judgment in this particular on a saying of the prophet, “ *Whosoever plays at chess or dice does, as it were, plunge his hand into the blood of a hog.*” Moreover, plays of this nature are apt to withhold men from the adoration and worship of GOD at the set periods; and the prophet has said, “ *Whatsoever tends to relax men in their duty to GOD is considered in the same light with the practice of gaming.*”—It is also proper to remark, that if a man play at chess for a stake, it destroys the *integrity* of his character, and renders him a *Fàsik*, or *reprobate*; but if he do not play at it *for a stake*, the integrity of his character is not affected. *Abou Yoozaf* and *Mohammed* hold it

it abominable to salute any person that is engaged in play; since, in thus refraining, our abhorrence of gaming may be expressed. *Haneefa*, on the contrary, holds it proper, as being the means of diverting the parties from their game.

THERE is no impropriety in a person receiving a present from a slave who is a merchant; or in accepting from him an invitation to an entertainment; or in borrowing his carriage: but it is abominable to receive from him a present either of cloth or money.—What is here advanced proceeds upon a favourable construction of the law. Analogy would suggest that there is no difference whatever between his invitations and his presents consisting of cloth or money;—in other words, they are all equally abominable in the acceptance, as being all *gratuitous* acts, to which a slave is not competent.—The reason, however, for a more favourable construction of the law, in this particular, is that the prophet accepted a present from *Soliman* when he was a slave, and from *Bareerá* when she was a *Mokátibá*. A number of the companions, also, accepted an invitation from the freedman of *Aboo Ruffaid* whilst he was yet a slave. There is, moreover, a sort of necessity which operates upon a mercantile slave, and obliges him to give into these several customs. Thus, for instance, if a person, having gone to his shop with a view to purchase wares, and having requested of him something to drink, should be refused by him, in that case he would consequently incur the imputation of covetousness, few people would frequent his shop, and his trade would thereby be ruined. Besides, when a slave is permitted to trade, he implicitly possesses all the power of a merchant in its full extent. But he is under no necessity of *clothing* people, or of distributing *money* to them; and hence it is not allowed to him to perform such acts, in conformity with what analogy suggests upon this subject.

Presents (except of *cloth* or *money*) and entertainments may be accepted from a mercantile slave.

General rules  
with respect  
to infant  
orphans or  
foundlings.

If a person bestow any thing in gift or alms upon an orphan\* under the protection of a particular person, it is lawful for that person to take possession of such gift or alms on his behalf.—It is here proper to remark, that acts in regard to infant orphans are of three descriptions.—I. Acts of *guardianship*, such as contracting an infant in marriage, or selling or buying goods for him; a power which belongs solely to the *Walee*, or natural guardian, whom the LAW has constituted the infant's substitute in those points.—II. Acts arising from the *wants* of an infant; such as buying or selling for him on occasions of need; or hiring a nurse for him, or the like; which power belongs to the maintainer of the infant, whether he be the brother, uncle, or (in the case of a *foundling*,) the *Mooltakit*, or *taker-up*, or the *mother*, provided she be maintainer of the infant; and as *these* are empowered with respect to such acts, the *Walee*, or natural guardian, is also empowered with respect to them in a still superior degree;—nor is it requisite, with respect to the *guardian*, that the infant be in his immediate protection.—III. Acts which are purely *advantageous* to the infant, such as accepting presents or gifts, and keeping them for him; a power which may be exercised either by a *Mooltakit*, a brother, or an uncle, and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infant's receiving benefactions of an advantageous nature.—The infant, therefore, is empowered in regard to those acts, (provided he be discreet,) or any person under whose protection he may happen to be.

It is not lawful for the *Mooltakit* [taker-up] of a foundling to hire him out in service; nor is it lawful for an uncle to do so by his infant nephew, although he be under his immediate care. It is otherwise with a *mother*; for she may lawfully let her infant child to hire, provided she have immediate charge of him; because a mother is em-

\* Arab. *Lakett*. Properly, a *foundling*. (See Vol. II. p. 257.)

powered

powered to use the services of her infant child by employing him, without tendering him any return,—whereas a *Maaltakit* or an uncle have not this power.—If the child should of himself enter into an engagement of service, it is not valid, as there is a possibility of its tending to his prejudice.—Still, however, if after having hired himself out he should fulfil his engagement, it is then valid; because in thus confirming it his advantage only is consulted; and he is consequently entitled to the hire agreed for.

It is abominable for a person to fix an iron collar on the neck of his slave in such a manner as to deprive him of the power of moving his head, according to the custom of tyrants; because a punishment of this nature is like the torments of the damned, and is consequently unlawful, in the same manner as scorching with fire.

A master must not fix an iron collar on the neck of his slave;

A MUSSULMAN may imprison his slave; for as a custom prevails amongst the *Mussulmans* of confining people who are mad or feditious, so in a similar manner it is lawful for a person to confine a slave, that he may prevent his absconding, and thus secure his property.

but he may imprison him.

It is not abominable to apply a glyster in a case of need; because medical practices are approved, in the united opinion of all our doctors, as well as by the traditions of the prophet. An application of this kind is, moreover, equally proper, whether it be administered to a man or woman. It is not allowable, however, to have recourse to any forbidden thing, such as *wine*, or the like; for it is unlawful to seek health by unlawful means.

Glysters are allowed in cases of necessity.

It is not improper to defray the allowances of a *Kázee* from the public treasury, because the prophet nominated *Atab Bin Osaid*

The allowances of a *Kázee* are 30



be defrayed  
from the  
public trea-  
sury.

*Kázee* of *Mecca*, appointing him his allowance from the public treasury there; and he also nominated *Alee* to be *Kázee* of *Yenna*, appointing him his allowance from the treasury there.—Besides, as a *Kázee* is, by the nature of his office, confined to the business of guarding the rights of *Mussulmans*, his maintenance is therefore drawn from their property, (and the public treasury is the property of the *Mussulman* community;) for a confinement to any particular office or duty entitles to maintenance; as holds in the case of an *executor*, or a *Moxáribat* factor who travels with the stock.—It is to be observed, however, that the propriety of the *Kázee* receiving his allowance from the public treasury is only where he takes it in a satisfactory manner, without any condition; for if he should refuse to undertake the office, unless the sovereign allow him a certain salary, it is unlawful; because he in such case demands a reward for the discharge of an act of piety; for such the office of a *Kázee* is; nay, the exercise of jurisdiction is the noblest species of devotion.—It is also proper to remark, that if a *Kázee* be *poor*, it is most eligible, or rather *incumbent* on him to receive his maintenance from the public treasury; for otherwise he would be unable to support the dignity of his office, from a necessary attention towards the concerns of his subsistence. If, on the contrary, he be *rich*, some deem it most eligible that he should *not* receive his allowance from the public treasury; whilst others maintain that it is incumbent on him so to do. The latter is the better opinion; because otherwise the office might be rendered low and contemptible; and also because, if an indigent person should succeed a rich *Kázee*, it would then be difficult for him to procure a salary, as that had been, perhaps, for a long time relinquished.

Case of a  
*Kázee* dis-  
missed after  
having re-  
ceived his al-  
lowance.

If a *Kázee*, having possessed himself of one year's allowance, should be dismissed from his office before the expiration of that year, there is in this case a disagreement amongst our doctors, in the same manner

manner as they have differed in opinion where a wife dies in a similar predicament \*. The better opinion, however, is that he should restore the excess.

THERE is no impropriety in a female slave or an *Am-Walid* travelling without being attended by a kinsman; because a stranger (as has been already explained) is considered the same as a kinsman with respect to looking at or touching a female slave; and an *Am-Walid* is also a slave, as being *property*, although she cannot be sold.

Female slaves may travel without being attended by a kinsman.

\* See Vol. I. p. 399.

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HEDAYA.

# H E D A T A.

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## B O O K XLV.

### *Of the CULTIVATION of WASTE LANDS\*.*

Definition of  
*Mawât*,

**M**AWÂT (which is here rendered *waste land*) signifies any piece of ground incapable of yielding advantage, either from a want of water, an inundation, or any other cause, such as prevents tillage; and it is termed *Mawât*, or *dead*, because, like the dead, it is of no use.

and descrip-  
tion of the  
land so  
termed.

ANY piece of ground which, from a long time, has lain waste without belonging to any person, or which has been formerly the

\* Arab. *Abya-al-Mawât*, meaning, literally, *the revival of the dead*.

property

property of a *Mussulman*, who is not then known, and is likewise so far removed from a village that, if a person call out from thence, his voice cannot there be heard, is termed *Mawât*. The compiler of the *Hedâya* remarks that this is the explanation of it as delivered by *Kadooree*. It is reported from *Mohammed* that it is requisite the ground be neither the property of a *Mussulman* nor a *Zimmee*; and likewise, that it be of no use; in which case it becomes absolutely *Mawât*: but that ground which is the property either of a *Mussulman* or a *Zimmee* is not *Mawât*.—If the proprietor be unknown, the ground in the mean time belongs to the *Mussulman* community;—but if he afterwards appear, it must be restored to him, and the cultivator is responsible for whatever damage he may have occasioned.—With respect to the ground being distant from a village, as mentioned by *Kadooree*, *Abou Yoosaf* is of opinion that this is a condition, for this reason, that where the ground is contiguous to a village it cannot be said to be entirely useless to the inhabitants of it. *Mohammed* holds it sufficient that the villagers do not in reality make use of the ground, whether it be contiguous or not. The same opinion has been delivered by the *Imâm* styled *Khabir Zâdâ*: but *Shims al Aymâ*, the *Siruckshian*, has adopted the opinion of *Abou Yoosaf*.

WHOSOEVER cultivates waste lands, with the permission of the chief, obtains a property in them; whereas, if a person cultivate them *without* such permission, he does not in that case become proprietor, according to *Haneefa*. The two disciples maintain that, in this case also, the cultivator becomes proprietor; because of a saying of the prophet, “*Whosoever cultivates waste lands does thereby acquire the property of them*;” and also because they are a sort of common goods, and become the property of the cultivator in virtue of his being the first possessor; in the same manner as in the case of seizing game, or gathering firewood. One argument of *Haneefa* on this point is a saying of the prophet, “*Nothing is lawful to any person but what is permitted by the IMÂM*:”—and with respect to the saying quoted by

The cultivation of waste lands invests the cultivator with a property in them.

the two disciples, it is to be construed merely into a *judicial permission*, (for the prophet was himself an *Imám*,)—in the same manner as where he said, “*Whoever kills an infidel is entitled to his armour.*”— Besides, all waste lands are plunder, seeing that the *Mussulmans* acquired the possession of them by conquest: and hence no person can assume a property in them without the consent of the *Imám*, as holds in all cases of plunder.

*Tithe* only is due from land so cultivated, unless it be moistened with tribute water.

IF a person cultivate waste land, a *tithe* only is due from it, for it is unlawful to charge a *Mussulman* with tribute in the beginning: but if the land be moistened with tribute water, tribute may lawfully be imposed, as it then becomes due on account of the water.—If, also, a person cultivate waste lands, and afterwards relinquish them, and another then cultivate them, some have said that the second cultivator is best entitled to the property; for the first was owner of the *profits* merely, and not of the land itself; and therefore, upon his relinquishing it, the second obtains a superior claim. It is certain, however, that the first cultivator may resume the lands from the second, because he is proprietor of them in virtue of having brought them to a state of cultivation, (as appears from the saying of the prophet quoted in the preceding case,) and does not forfeit his property by the relinquishment.

In the cultivation of the circumjacent grounds, a road must be left to it.

IF a person cultivate a piece of waste land, and four others afterwards so cultivate the circumjacent ground as to obstruct the passage into his property, it is reported, from *Mohammed*, that his road is to lead through the ground of him who cultivated last; for, after three of the sides bordering upon his property had been cultivated, the other of consequence remains for his ingress and egress; and therefore the person who cultivates it wilfully aims at the destruction of his right,

IF

If a *Zimnee* cultivate waste lands, he becomes proprietor of them, in the same manner as a *Mussulman*; because cultivation endows with a right of property. (*Haneefa*, however, holds that the consent of the *Imám* is requisite.)—A *Zimnee* and a *Mussulman*, therefore, are alike in this respect, in the same manner as in all other points of property.

A *Zimnee* acquires a property in the land he cultivates, as well as a *Mussulman*.

If a person circumscribe a piece of ground, and set marks upon it with stones or such like, and keep it in that state for the space of three years without cultivating it, the *Imám* may in that case lawfully resume it, and assign it to another; because the ground was given to the first with a view to his cultivating it, so that a benefit might ensue to the *Mussulmans* from the collection of the tithe and tribute; and as he neglected this, it is therefore incumbent on the *Imám* to deliver it over to another, that the end for which it was given to the first may be answered.—Moreover, the encompassing of the ground with stones, &c. does not, like cultivation, create a right of property, since by *cultivating* the land is understood rendering it productive, whereas the encompassing it with stones serves merely to designate the boundaries: the land, therefore, still remains unappropriated as before.—With respect to the specification of three years, as here mentioned, it is founded on a saying of *Omar*, “*The marker has no right after three years have elapsed.*”—It also proceeds on this principle, that three periods of time are requisite for a person who marks lands; one, that he may go to his place of abode after having set the marks; another, that he may there settle his affairs; and a third, that he may return to his land; and each of these several periods is determined at a year, as it is probable any less division of time, such as an hour, a day, or a month, might not suffice to answer the purpose. If, therefore, after the elapse of three years the marker return not to his lands, it is presumed that he has relinquished them.—Lawyers remark that what is here advanced proceeds upon a principle of equity; but that, in strictness of law, if a person cultivate the lands which another has marked

If the land be not cultivated for three years after it is marked off, it may be transferred by the *Imám*.

Manner of  
marking off  
waste land.

before the elapse of the period above mentioned, he becomes the proprietor of them, as in this case he is the cultivator, and not the other. It is here proper to observe that waste lands may be marked by other modes besides setting stones, such as by surrounding them with the branches of trees; by burning the underwood and thorns which may be growing upon the lands; or by collecting them together and scattering them, mixed with a little earth, about the borders, without carrying them so uniformly round as to form a continued boundary; or, lastly, by digging a trench one or two yards in width.

Cultivation  
is established  
by digging  
and watering  
the ground,

It is related, as an opinion of *Mohammed*, that if a person dig up and water a piece of waste land, he is then the *cultivator* of it; whereas, if he dig it up or water it singly, he is only held to have set a mark upon it.—In the same manner, if he dig a trench or ditch without watering the land, it is considered only as marking; whereas, if he moisten it with water, after digging a trench, it is cultivation. If, moreover, a person raise an enclosure round the land so high as to be a dam to the water, he is held to have cultivated it, and so likewise if he sow seed in it.

enclosing it,  
or sowing it  
with seed.

It must not  
be practised  
on the borders  
of land al-  
ready cul-  
tivated.

It is not permitted to cultivate a piece of waste land immediately bordering upon lands that are in a flourishing state; as it is requisite that a space be left for the use of the cattle of the other proprietor, and also for piling up his stacks, whence such land does not come under the description of *waste* any more than a river or a highway;—and accordingly, our doctors have said, that it is not lawful for the *Imâm* to bestow on a person any article of indispensable use to the *Mussulmans*, such as a salt-pit, or a well from which the people draw water to drink.

A space is  
appropriated  
to wells dug

WHOEVER digs a well in waste land is entitled to a space or piece of land \* round it. If, therefore, the well be dug for the use of

\* Arab. *Hareem*; meaning, literally, *prohibited to others*.

camels,

camels, a space of forty yards is annexed to it.—This is related in the traditions. Several of our doctors have construed the forty yards to mean the *aggregate* space. The better opinion, however, is that forty yards are annexed to each side of the well; for as many lands are of a soft and humid soil, it might happen that if another person should dig a well at a less distance from the first than forty yards, the water of the one might ooze through the earth and communicate with the other. If the well be dug with a view to drawing water from it by means of camels or other animals\*, in that case the space of sixty yards is annexed, according to the two disciples. *Haneefa* holds that in this case likewise only forty yards are allowed.—The arguments of the disciples upon this point are twofold.—FIRST, a saying of the prophet, “*The precincts of a fountain are five hundred yards, of a well from which camels may drink forty, and of a well from which water is drawn sixty yards.*”—SECONDLY, there is a necessity that a considerable space be annexed to a well of this nature, since the camels may be required to be led to a distance from it, as the rope by which the water is drawn up is often of long extent; but where wells are so made that the water may be taken out by the hand, it is not necessary that any great space be allotted on this account; and therefore a difference should certainly be made between the two sorts of wells. *Haneefa* argues from the tradition before cited, in which forty yards are mentioned, without distinguishing between the two species of wells. The objection, moreover, started by the two disciples may be obviated by making the camels revolve round the well with the rope, instead of driving them directly from it.

If the well have a fountain in it, the space annexed to it is five hundred yards; because of the tradition before quoted; and also, because a large space is here absolutely requisite; for as the fountain is brought out to water the ground, one space is required through which

\* See note in Vol. II. p. 327.

the



the water may be conducted from the fountain; another for a reservoir wherein the water may be collected; and a third for conveying the water from the reservoir to moisten the lands for cultivation. A considerable space is therefore required; which is determined at five hundred yards, by the tradition; and this, according to the most authentic opinions, means five hundred yards on each side of the fountain; the yard measuring six spans.—(Some have said that the annexation of five hundred yards to a fountain is only in the country of *Arabia*, where the soil is hard; but that in our country, where it is soft, a larger extent is required, as otherwise the water of one fountain might transude through the earth and communicate with that of another.)

within the  
limits of  
which no  
other person  
is entitled to  
dig;

If a person attempt to dig a well within the limits of the proprietor of another well, in that case the other may prohibit him; because the limits of his well are his property, (as has been explained,) and therefore none has a right to encroach upon them. If, also, a person should actually dig a well within the limits of another, the first proprietor has in that case the option either of filling it up himself gratuitously, or of forcing the other so to do.—Some have said that, in this case, the first proprietor is to take a compensation for the damage from the other, and then to fill up the well himself;—in the same manner as where a person destroys a wall the property of another, in which case he must make reparation to the proprietor, who must rebuild it himself. This is approved. It is related in *Khasf*'s treatise upon the duties of a *Kázee*, that the damage, in this instance, must be computed by a comparison of the value the first well bore before the other was dug, with what it bears afterwards; the difference shewing the loss sustained.

or, if any do  
so, he is re-  
sponsible for  
such acci-

THERE is no responsibility for any thing which may happen to be destroyed by falling into the first of the two wells, as the proprietor, in digging it; was not guilty of any trespass.—This is evident, in the opinion

opinion of *Haneefa*, if he dug it with the consent of the *Imâm*; and also in the opinion of the two disciples, whether it was done with the consent of the *Imâm* or not;—according to *Haneefa*, because the digging of a well, in this instance, was the same as the setting of marks, which may be done without the consent of the *Imâm*, although the property cannot be acquired without his permission.—If, on the contrary, any thing be destroyed by falling into the *second* well, it must be atoned for, as the proprietor of this well has been guilty of a trespass in having dug upon the property of another. If, on the other hand, a person dig a well bordering on the precincts of another, without however encroaching upon it, and the water of that other should then decrease, he is not liable to make any compensation, as he is not here guilty of any transgression.—In this last case, moreover, the second digger is entitled only to the ground on three sides of his well, as the ground on the side of the first well is the property of the first digger.

WHOEVER digs a channel \* for conducting water to any place, has a space annexed to it, according to his want. It is related by *Mohammed* that an aqueduct is the same as a well, so far as regards the annexing of land to it.—Some say that this is the doctrine of the two disciples; but that, according to *Haneefa*, no space is allowed, except when the water appears above ground; for as an aqueduct is in fact merely a *rivulet*, it is therefore subject to the same rules. Several doctors have, however, maintained that when an aqueduct appears above ground, it is then considered in the same light as a spring or fountain; and that consequently the same quantity of land is annexed to it, namely, five hundred yards.

If a person plant a tree in a waste spot of land, he is entitled to or to a tree.

\* Arab. *Kanât*. Perf. *Kariz*. It is generally understood to mean a *subterraneous aqueduct or drain*.

a small

planted in  
waste land.

a small space as an appendage to it; wherefore no other person is allowed to plant a tree on the ground within his precincts, as this space is useful to him for collecting his fruits, and heaping them upon it. The space allotted to a tree is the measure of five yards, agreeably to what occurs in the traditions upon that subject.

The deserted  
beds of rivers  
must not be  
cultivated.

LANDS through which the *Euphrates*, the *Tigris*, or any similar river formerly ran, must not be cultivated, if it be possible that the river may again run over them; as the people whose lands lie adjacent to the river in its former course have an interest in desiring that the river may not be prevented from returning to it. If, however, the lands be not likely to be again overflowed, they are then held to be waste, provided they do not adjoin to any cultivated spot;—because such lands are not the property of any one; for the superiority of water repels all other superiority; but as soon as the land appears above the water it becomes subject to the *Imâm*.

A space is  
not allowed  
to an aque-  
duct running  
through an-  
other's land.  
without proof  
of prior right.

WHOEVER has the property of an aqueduct, which runs through land belonging to another, is not (according to *Haneefa*) entitled to any adjacent space, unless he produce evidence to prove his right.—The two disciples, on the contrary, maintain that he is, in virtue of his property in the aqueduct, entitled to the banks on which people pass, and which the earth thrown up by the excavation of it occupies. Some have said that the difference of opinion in this case is founded on that which obtains where a person digs a canal in waste lands by permission of the *Imâm*; for in this case, according to *Haneefa*, he is not entitled to any space; whereas the two disciples maintain that he is so entitled, since he can derive no advantage from the canal unless he possesses a space annexed to it, as he must often be obliged to walk along the banks of it to clear away any incumbrances that may stop the course of the water, it being impracticable for a person, in the common course of things, to walk in the *middle* of it.—As, moreover, he is often necessitated to dam it with earth and clay, and it is im-  
possible

possible for him to bring these from any distance without incurring an extraordinary expence; he is therefore entitled to a space of ground, in the same manner as a person who digs a well.—The argument of *Haneefa* is, that the claim to any space is repugnant to analogy, the right to it being established, in the case of a well, solely on the ground of the precept before quoted. Besides, the necessity for a space, in the case of a well, is more urgent than in the case of a canal or aqueduct; for, in the latter, the use of the water may be enjoyed without any space,—whereas, in the former, this is impossible, as the water must be pulled up by a rope, to effect which a space is requisite, as has been before explained. Hence there is an obvious difference between a well and a canal; and consequently they can bear no analogy to each other. The reason for founding the case in question on this is, that if the proprietor of the aqueduct be entitled to a space of land, he is held to be seized of the said space as a dependancy of the aqueduct; and the evidence of the possessor is valid in case of a contest; whereas if, on the contrary, he be not entitled to any space, he is not held to be seized of it, and circumstances therefore testify for the proprietor of the land; as shall shortly be explained.—If, however, the case in question be considered separately, and not as founded on the above, then the two disciples argue that the space is in the hands of the proprietor of the aqueduct, as he preserves the water by means of it,—whence it is that the proprietor of the land is not entitled to break it down.—*Haneefa*, on the other hand, argues that the dependant land resembles the other land of the proprietor, with respect both to appearance and substance:—with respect to appearance, because it is on a level with, and joins to it; and with respect to substance also, because it is of the same soil, and is equally capable of nourishing trees and vegetables; and circumstances testify for him who is in possession of what bears the greatest resemblance to the dependant ground, namely, the land adjacent to it;—in the same manner as where two people contend for a door-plank in the possession of some other person, and which exactly quadrates with another that is

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possessed

possessed by one of the litigants; for in that case the *Kázee* must adjudge such plank to be the property of him who possesses the correspondent one.—In reply to what the two disciples further urge, it may be observed that the contest here does not hinge upon what was placed for the conservation of the water [the banks,] but upon what is independant of it, and fit for producing trees, &c. Besides, supposing that the proprietor of the aqueduct preserves the water only on account of the dependant space of land, it may be answered that the proprietor of the ground preserves it only on account of the dependant space of land likewise.—With respect, moreover, to what they urge, that “the proprietor of the land is not entitled to break down the “banks of the aqueduct,” it is to be observed that this is not because they are the *property* of the proprietor of the aqueduct, but merely because he has an *interest* in them;—in the same manner as where a person is possessed of a wall, and another, having the property of a wall near it, lays beams across both with the assent of the other; for in such case the other has not afterwards the power of pulling down his own wall, since he must thereby injure the right of this person.

Differences  
of opinion  
concerning  
aqueducts.

It is related, in the *Yama Sagheer*, that if a person possess an aqueduct, having banks on each side, and adjacent to them a piece of land belonging to some other person, and the banks be not in the hands of any one, that is to say, be destitute of marks, such as trees, stones, or the like, to determine the property, those banks belong to the proprietor of the land, according to *Haneefa*;—whereas the two disciples hold that they appertain to the proprietor of the river.—If, on the contrary, the mark of any person be left upon them, they are then unanimously of opinion that the marker has the better claim.—Still, however, they differ in opinion where there is a tree upon the banks, and it is not known who planted it; for *Haneefa* is of opinion that to plant a tree is the right of the proprietor of the ground, whilst the two disciples hold this to be the right of the proprietor of the aqueduct.

duct.—With respect, also, to throwing up earth, many have said that there is a disagreement; whilst others have said that this belongs to the proprietor of the aqueduct, provided he do not exceed the prescribed bounds. With regard to walking upon the banks, some have said that it is not permitted, in the opinion of *Haneefa*; whilst others have said that it is not prohibited, because of there being a necessity for it. The learned *Aboo Yáfir* has said that he would decree according to the opinion of *Haneefa* in the case of planting a tree,—and according to that of the two disciples, in the case of throwing up earth. It is reported, from *Aboo Yoosaf*, that the width of the dependant space of an aqueduct is half the breadth of the aqueduct; but according to *Mohammed* it is the whole breadth: and this opinion is the most favourable to mankind.—It is here proper to observe, that the subject resolves itself into several sections, treating of the cases of *Shirbá*, or a right to water, whether derived from the possession of land, or from other causes.

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## SECT. I.

### Of WATERS.

If a person have the property of a canal, a well, or a reservoir, he cannot prohibit either man or beast from drinking of it.—Here it is necessary to premise that water is of four kinds. I. The water of the ocean, which every person has a right to drink, or to carry away for the purpose of moistening his lands.—If, therefore, a person incline to dig a canal, and convey the water in it from the ocean to his land, no person has power to prevent him from so doing; for the enjoyment of the water of the ocean is common to every one, in the same man-

All people have a right to drink from a well, canal, or reservoir; and also cattle;

ner as the light of the sun or moon, or the use of the air.—II. The water of large rivers, such as the *Oxus*, the *Euphrates*, or the *Tigris*, in which every person has an absolute right to drink, and also a conditional right to use it towards moistening his lands;—that is to say, a person, if he cultivate waste land, may dig a channel for the purpose of conveying water to it from the river, provided his doing so be not detrimental to the people: but if there be a probability of its being hurtful in its consequences, (as if, by opening the banks, the water should overflow the country and villages around,) in that case he is not permitted to dig a channel for the watering of his land, as the prevention of a public evil is a consideration of greater moment.—Analogous to this, also, is the erection of a mill on the banks of a river; for the demolition of the banks by the mill is the same as by watering land.—III. Water in which several have a share;—and in which, likewise, the right of drinking is allowed to every one; for it is recorded in the traditions that three things are common to all, namely, *water*, *grafs*, and *fire*. Besides, wells, and the like, are not dug for the purpose of *preserving* water; and hence the water of them is not the property of any one; for it is common, and as such cannot be made a particular property until it be separately kept and preserved;—as holds with respect to a deer that only sleeps upon a person's ground. There is, moreover, a necessity for establishing this common right with regard to water, since it is impossible for every person to carry it along with him; and as a person may be in want of it for himself and his horse, mankind would therefore be too much cramped if an unlimited use of it were not granted them. If, however, a person incline to bring water to moisten the land he had cultivated from a river or canal which belongs to others, the proprietors may prevent him, as otherwise their right of watering \* would be entirely destroyed.—IV. Water which is preserved, or, in other words, kept in vessels. Water of this description is property, because of its detention; and

\* Arab. *Shirbá*, a particular right to water, explained in the course of this book.

the right of others no longer extends to it;—in the same manner as holds with respect to game, after being taken by any person. Nevertheless, it is doubtful whether this water may not also be participated, because of the tradition before quoted. Hence, if a person, in a time of scarcity, steal a quantity of water equivalent to the amount which constitutes theft, he is not liable to amputation.

If a person be possessed of a well, fountain, or rivulet, he may prevent any one from drinking the water of them, or encroaching on his property, provided there be other water at a little distance, and which is not the particular property of any one. If, however, this be not the case, the proprietor must then either bring him water to drink, or permit him to take it himself, on condition that he destroy not the banks. What is here advanced is reported from *Tabávee*.—Some have said that this is approved, in case the possessor of the well have dug it himself in land which is his own property: but that, if he should have dug it in waste lands, he is not, in that case, on any account permitted to prohibit others from entering on his premises to drink water; for the waste lands are a common right; and as the well was dug towards the promoting of a common right, namely, tithe and tribute, it follows that the digging of it is not destructive of the liberty of drinking. If, therefore, the proprietor refuse the other permission to drink, and that other be apprehensive either of the death of himself or his horse from an excess of thirst, he may then lawfully oppose the proprietor with weapons, as he has already aimed at his destruction in withholding his right, namely, the water; for the water of a well is common, and is not property.—It is otherwise with respect to water kept in vessels; for a person in want of it where it is so kept, is only permitted to contend with the possessor of it *without* weapons. The same law obtains in the case of a person oppressed with hunger. Many have said that in the case of a well it is not lawful to use weapons; but that it is allowable

unless there be other water at a little distance.



allowable to contend with a stick; for the possessor is guilty of an offence in refusing the water; and the application of a stick is a substitute for correction.

Water may also be carried away for the purpose of ablution,

or for watering trees or parterres.

It is lawful for men to carry away water from a rivulet to perform their ablutions, or to wash their garments.—This is approved; because, to desire men to purify themselves, or to wash their garments with such water, *without carrying it away*, (as mentioned by some,) would be attended with much inconvenience.—If, also, a person be inclined to water the trees or small parterre before his house, he may lawfully carry away water for that purpose from the rivulet of another; for the law allows great liberty in the case of water, and considers the refusal of it as truly opprobrious.—A person is not, however, allowed to carry away water either from the rivulet, well, or aqueduct of another, for the use of his orchard or fields, unless he be expressly permitted so to do; and the proprietor may prohibit him from it; because when water is possessed in joint property, none but the proprietors have any right to the use of it, as otherwise their right would be defeated.—Still, however, the proprietor of the river may, if he choose, either give or lend the water of it to another, because it is his property, and because the gift of such is customary; in the same manner as holds with respect to water preserved in vessels.

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SECT.

## S E C T. II.

*Of digging or clearing RIVERS\*.*

RIVERS are of three kinds.—I. Such as are not the property of any; and of which the waters have not been divided, like the *Tigris*, *Euphrates*, &c.—II. Such as, being appropriated and divided, are at the same time public rivers, in which boats sail.—III. Rivers that are held in property, and divided; and are also private, in which no boats sail.—In the first kind of rivers, if the river fill up so as to require digging, the care thereof devolves upon the chief †, who is to defray the charges of it from the public treasury; for as the work is performed for the advantage of the *Mussulman* community, the expence attending it must be defrayed from the *property* of the community;—those expences must, however, be disbursed from the funds of *tribute* and *capitation-tax*, and not from those of *tithe* and *alms*; for the latter are appropriated solely to the use of the poor, whereas the former are intended as a provision to answer contingencies.—If there be not any money in the public treasury, the chief is in that case at liberty, with a view to promote the public utility, to compel the people to repair the damage in question, as it is presumed they would not of themselves apply to the work,—whence it was that *Omar Farook* said to the people, “*Were I to leave you to your own direction, without ever using compulsion, verily, matters would come to such a pass that you would even sell your children.*”—None, however, must be com-

*Rivers are of three descriptions.*

Great public rivers must be cleared and repaired at the expence of the public treasury;

or by a general contribution of labour;

\* Arab. *Nibr*.—It is a term of very general application, signifying not only rivers properly so called, but also *canals*, or any other species of aqueduct constructed by art.

† Arab. *Wālee*; meaning, generally, the governor of a province or district.

and appropri-  
ated rivers,  
at the ex-  
pence of the  
proprietors.

pelled but such as are able to work; and such as are not able to work, and are rich, must pay a certain sum, according to their particular station and ability.—With respect to the second kind of river, it must be cleared, when requisite, at the expence of the proprietors, without any supply from the public treasury; for the right of the river particularly belongs to them, as does also the use of it.—If, therefore, any one of them should refuse to assist in digging, the chief may compel him, to the end that the others may not suffer any injury by his refusal.

OBJECTION.—It would appear that, in being thus forced to work, the refuser suffers an injury.

REPLY.—Such injury is particular, and is not without its use, for in recompence thereof the party obtains his share of the water; it is not, therefore, to be put in competition with the common injury that would otherwise be suffered by the rest.

—If, also, some of the proprietors of the river be desirous of strengthening the banks, from an apprehension that they might give way, and it be probable that bad consequences may ensue from their decay, (such as inundating the neighbouring country, and breaking up the roads,) the chief may in that case use compulsion with any of them who refuse to assist in the undertaking. He must not, however, use force where the decay of the banks cannot produce any bad consequence; for the fall of the banks is an event merely *probable*. It is otherwise with respect to clearing a river in a case of necessity; for that is a matter of certainty,—whence it is that compulsion may be used to effect it.—With respect to the third kind of rivers, they are particularly appropriated, and therefore the digging of them is entirely the duty of the proprietors.—Some have alleged that the magistrate may employ force with any who refuse to dig; in the same manner as in the case of the second kind of rivulets. Others, again, have maintained that the magistrate has not a power of this kind; since both of the injuries, namely, that of the partner on whom compulsion is used, and also that which the other partners sustain in consequence of

of his refusal, are private; and the injury to the other partners may be remedied by their taking from the one who refuses to work a part of the expence incurred in digging the rivulet, proportionately to his share; (provided, however, that the work be executed at the instance of the magistrate.)—It is otherwise with respect to the *second* kind of rivers, as there one of the injuries is *public*.

OBJECTION.—Here likewise is a conjunction of two injuries; and as one of these (namely, that sustained by those who have a right to drink the water) is public, it would follow that, to prevent this public injury, compulsion may be used in the case of private rivers likewise.

REPLY.—No compulsion is used in digging towards obtaining water to drink:—thus if the whole should refuse to dig, the magistrate cannot employ force\*.

IN digging a watercourse, the expence incurred in the upper part is equally defrayed by the whole of the partners: but when the work is carried beyond the land of any one of them, he is then, according to *Haneefa*, exempt from all further charge. The two disciples maintain that the expences of digging from the head to the end of the watercourse is jointly defrayed by the several partners, according to the extent of their shares; because the partner possessing the higher share has likewise a right in the lower ones, they being needful to him, in receiving the discharge, from his part, of the superfluous water. *Haneefa*, in support of his opinion, argues that the end of digging the watercourse being to obtain water for the purpose of cultivation, the object of the higher sharer is consequently obtained when his part is finished; and he is not, therefore, under any obligation after that to assist in prosecuting the work solely for the benefit of others.—With

Rules with respect to drains, watercourses, &c.

\* When water is wanted, towards moistening lands for cultivation, the magistrate may then employ force in causing a rivulet to be dug; but not where the water is wanted only to drink.

respect, moreover, to what the two disciples urge, it may be replied that, although the higher partner do indeed stand in need of the lower shares, for the passing away of the superfluous water from his share, yet he is not, on that account, obliged to dig these lower shares;—in the same manner as where a person has a right of passing the water from his house upon the terrace of another; in which case he is not under any obligation to unite in building or repairing such terrace.— Besides, the higher partner may at any time prevent the water from overflowing his land, by occasionally damming up the source or spring, thereby preventing the flow of any superfluity of water into his share.

WHEN, in digging a watercourse common to several partners, the work is carried beyond the share of one of them, who is thus exempted from any further charge, some have alleged that he may then immediately open the spring-head, or inlet, in order to obtain water for cultivation, as the watercourse, with respect of him, is wholly dug. Others have said that he cannot do so until the shares of the other partners be likewise completed; in order to prevent any preference among them.

SUCH persons as have only a right to *drink* the water, are not subject to pay any part of the charges of digging, as those are numberless, and are, moreover, subordinate to the actual sharers.

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## S E C T. III.

*Of Claims of SHIRB\*; and of Disputes and particular Privileges with respect to it.*

A CLAIM of *Shirb*, or right to water, is valid independant of any property in the ground, upon a favourable construction of the law; for a person may become endowed with it, exclusive of the ground, either by inheritance or bequest; and it sometimes happens that when a person sells his lands he reserves to himself the right of *Shirb*. Besides, *Shirb* being a desirable object, and also capable of yielding advantage, the claim to it is therefore valid.

A right to water may exist independant of the ground.

If a person be possessed of a rivulet running through lands which are the property of another, and the proprietor of these lands, being desirous that it should not run through them, attempt to prevent it, on the plea of its being his property, he must not be permitted to do so, but the rivulet must be suffered to flow in its usual channel;—for, as the rivulet is in the possession of the person who has the property of it, because of his water running in the bed of it, his word, in case of a litigation, is therefore to be credited in preference to that of the other;—whereas, if the rivulet were not in his possession, (as if it should contain no water,) in that case the word of the proprietor of the lands would be credited;—unless the other could prove by witnesses that the rivulet is his property, or that he formerly con-

No person can alter or obstruct the course of water running through his ground.

\* This term, which is purely technical, the translator, for the convenience of the English reader, has rendered, in general, *a right to water*.

veyed water through it towards his own grounds for the purpose of watering them, ~~when~~ the *Kázee* must decree it to him, as he thus substantiates his claim.—(Analogous to this is a contention concerning the property of a river-head, or a water drain, a spout, or a road through the court of another.)

In case of disputes, a distribution of the right to water must be made.

If a rivulet be jointly held by several persons, and they dispute concerning their particular proportions of right to water, a distribution must be made according to the extent of land which they severally possess;—for as the object of right to water is to moisten their lands, it is consequently fit that each receive in proportion to his territory.—It is otherwise in the case of a *road*; for the object in that being to pass and repass, the smallness or largeness of the house is of no weight in the division;—that is to say, if the partners in a road dispute concerning their shares, it is decreed that they shall hold it equally, and that no distinction shall be made from the difference of their houses.

A rivulet must not be dammed up for the convenience of one partner, without the consent of the others.

If it happen that the person who possesses the highest part of a rivulet be not able, without stopping the current, to enjoy his right to water in a satisfactory manner, (for this reason, that his lands, being high, precipitate the water from them with great velocity,) still he must not be permitted to dam the rivulet, as he would thereby destroy the right of the others: he must, therefore, take his share without stopping the current. If, however, the others assent to his stopping the current that he may the better water his land, or enter into an agreement that each shall stop it in his turn, it is lawful, as being their right. But if it be possible to effect the stoppage with a board, they must not use clay, or any kind of plaister, without the consent of the whole, as an injury would be thereby occasioned to the other sharers.

It is not permitted to any of the sharers to dig another rivulet leading from the common one, or to erect a water mill upon it;—because, in the former instance, the bank of a common rivulet must necessarily be broken; and in the latter, an erection is made of a building upon a partnership concern;—unless, however, the mill be stationed on the builder's land, and be not injurious, either to the ground, by breaking down the banks, or to the water, by diverting it into another channel;—in which case it is lawful, as being the exercise of a power derived from property, and from which there results not any injury to others.—(The erecting of a machine for raising water by camels, or oxen, is considered in the same light as the erecting of a mill.)—It is likewise unlawful for any of the sharers either to erect a small bridge which may be occasionally withdrawn, or a large one of stone or bricks which is durable and fixed.—In short, a private rivulet is considered in the same light as a private road, in which several participate, but in which none have any particular privileges.—It is otherwise where a person possesses a *small* private rivulet brought out from a large private one jointly held by several; for in that case, if the proprietor of the little rivulet choose he may erect upon it a large solid bridge; or, if there was previously a bridge over it, he may if he please pull it down, (provided a greater quantity of water than formerly do not, by that means, flow into his rivulet,) for under these circumstances the demolition of the bridge is lawful, being in virtue a power derived from his own property, which occasions no detriment to others. He must not, however, extend the inlet of the smaller rivulet, as he would thereby destroy the banks of the large one, and likewise draw a greater quantity of water into his own than is his due.—Neither must he be suffered to enlarge the sluice through which he receives his share of water, where the distribution is made in that manner,—that is, where boards with holes are fixed on the bank of the river contiguous to the lands of each partner, that he may receive, as his share, what-

ever

One partner in a rivulet cannot dig a trench or erect a mill upon it without the general consent;

nor construct a water engine or a bridge.



ever quantity of water issues through his board. — But any of them who chuses may either heighten or lower his particular board, as the equality of the division depends upon the largeness or smallness of the holes, and not upon the height or lowness of them, for an alteration in that respect occasions no difference in the distribution.

One partner cannot alter the mode of partition without the other's consent;

If, where the distribution is made by sluices, in the manner above described, one of the partners choose that the partition be made by the measure of time, he is not at liberty so to adjust it, unless with the concurrence of the others; for whatever is the established mode must be continued; as the right of every one is by that means more clearly distinguished.

or increase the number of openings through which he receives his share,

If each partner in an appropriated rivulet have a specific number of holes or sluices allotted to him, it is not permitted to any of them to increase that number, notwithstanding it may occasion no injury to the others; for here exists a partnership in particular property, and in which the right of each is particularly specified. — It is otherwise in the case of large rivers, such as the *Tigris* or the *Euphrates*; for as there any person is at liberty to dig a small rivulet, and fill it from them, he is consequently at liberty to increase the holes or sluices through which the waters pass from them.

or convey his share into lands not entitled to receive it,

or through such lands into those that are entitled:

It is not lawful for any of the partners in a river to convey his share of water into such of his lands as are not entitled to receive water from that river; for this circumstance might, in process of time, furnish an argument of his having a right to water these lands from that river. — Neither is it lawful for a partner to convey his share of water through such of his lands as are not entitled to it, into others that are; for, in this case, it

it is probable he would receive a greater quantity of water than his due, as part would be absorbed by the lands through which they first passed. (This is analogous to the case of a joint road, where one of the partners wishes to open a road to the inhabitants of a house, in the same range, whose road lies through another way, by permitting them to pass through his house in their way to their own.)

If two persons possess a rivulet jointly, and receive their shares by water issuing through sluices, and the one whose share lies nearest to the source be inclined to stop several of the sluices allotted to him, to prevent the issue of a superfluity of water into his lands, he must not be allowed so to do, as he might thereby subject the lands of the other sharer to be overflowed.—Neither is he at liberty to change the mode of participation, by taking the use of the whole, in rotation, instead of each receiving a moiety of the whole quantity; for as the division has already been settled by the mode of vents or sluices, he cannot afterwards require any other mode,—unless the other assent, in which case he may do so;—it still, however, remaining at the option of this partner (or of his heir, after his decease) to annul this, and revert to the former mode;—because the establishment of a division, by giving the whole to each in rotation, in a case where each had formerly held a separate share, is, in fact, *lending* a right to water, (as an exchange of *Shirb* for *Shirb* is null;) and a right to water is inheritable, or the *use* of it may lawfully be left in legacy; but it can neither be sold nor bestowed in gift, nor left in legacy to sell, give away, or bestow in alms, these several deeds being unlawful on account of the uncertainty to which they are liable, either from ignorance or deceit, with regard to the quantity of water,—or because *Shirb* is not, in itself, a substantial property, but rather a privilege or immunity, inso-much that if a person water his lands from the *Shirb* of another,

neither can he shut up any of the water-vents,

or adopt a partition by rotation.

he is not liable to make compensation for it ;—and these several deeds being void, a legacy for any of these purposes is also void.

A right to water cannot be assigned as a dower ;

or given as a consideration for *Kbo-la* ;—

A RIGHT to water is incapable of being assigned as a specific dower in a contract of marriage ; wherefore if such be mentioned in a marriage contract, a *Mibr-Misl*, or *proper* dower, is due. In the same manner, also, it cannot be given as a consideration for *Kboola* ;—whence, if a wife bargain for her divorce, in consideration of her making over such right, the husband may restore it to her, and, in lieu of it, take from her the dower he had assigned her on their marriage. The ground on which the law in these cases proceeds is, that a right to water is a matter the extent of which cannot be ascertained with any precision.

or in composition for a claim ;

A RIGHT to water is incapable of being given in composition for a claim ; for as it cannot, by means of any deed whatever, be rendered property, a composition in consideration of it is consequently null.

or sold, (without ground,) to discharge the debts of a defunct :— (mode to be pursued in this last instance.)

A RIGHT to water, without ground, cannot be sold after the death of any person to discharge his debts,—in the same manner as it cannot be sold during his lifetime. What, then, shall the *Imám* do, in this case, towards settling the debt of the deceased ?—This question has given rise to a diversity of opinions ; but the most advisable method of proceeding, in such an instance, is to join the right to the lands of another person not possessing such right, and then, with his consent, to dispose of both ;—when, computing how much the value of the lands has been increased by the addition of the right, he may apply the difference towards paying off the debts of the deceased. If he be not able to procure land in this manner, he may buy a piece of land, payable from the effects of the deceased, and, having joined it to the right, sell them together ; when, with the price

price so obtained, he must first discharge the purchase-money of the land, and then apply the residue to discharging the debts of the deceased.

If a person, having moistened his lands, or filled them with water, should by that means overflow the lands of his neighbour, he is not, in such case, liable to make a compensation, as he was not guilty of any transgression.

Any accident from the use of the water, does not induce responsibility.

# H E D A R A.

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## B O O K XLVI.

### Of PROHIBITED LIQUORS.

There are  
four prohi-  
bited liquors:  
1. *Khamr*,  
(the crude  
juice of the  
grape.)

**T**HERE are four prohibited liquors,—the first of which is termed *Khamr*\*, meaning (according to the exposition of *Haneefa*) the crude juice of the grape, which, being fermented, becomes spirituous,—first gathering foam and settling, and then possessing an inebriating quality. According to the two disciples, the juice be-

\* The translator has, in the course of the work, rendered every inebriating drink under the general term *wine*, which comprehends all descriptions of prohibited liquors.—In this book, however, he retains the original terms for the sake of distinction.

comes

comes *Khamr* upon its fermenting, and being spirituous without the condition of its gathering foam;—for whenever the juice of grapes becomes spirituous, the appellation of *Khamr*, and the characteristic of it, namely, *illegality*, are both established.—The argument adduced by *Haneefa* is, that fermentation is the commencement of the process by which liquor becomes spirituous, and which is completed when it foams and settles, as by that means the dregs are separated from the finer particles;—and the ordinances of the LAW regarding *Khamr*, (which are decisive,) such as punishment for drinking it, the holding him an infidel who shall deem it lawful, and the prohibition against selling it,—have all a reference to the *completion*. Some of the learned allege that it is declared unlawful to drink after having become spirituous, purely from motives of caution.—Others, again, maintain that the term *Khamr* is applicable to whatever is of an inebriating quality; because it is mentioned in the traditions, that “*whatever inebriates is KHAMR* ;”—and (in another tradition) “*KHAMR is produced from two trees, namely, the VINE and the DATE*.” The term *Khamr*, moreover, is derived from *Makhāmīrā*, signifying, *stupefaction*, or *deprivation of sense*, which is a consequence of drinking *any* inebriating liquor.—In reply to this, however, *Haneefa* argues that the term *Khamr*, according to the concurrent opinion of all lexicographers, is used only in the sense above mentioned, whence it is that to liquors of other descriptions other terms are applied, such as *Nabeex*, *Tabeehh*, and *Mosillis* \*. Another argument is that the illegality of *Khamr* is *indubitable*,—whence, if every inebriating liquor were *Khamr*, all such would of course be likewise indubitably illegal,—whereas this is not the case, for there is a doubt regarding them. In reply, moreover, to the arguments of *some* of the learned as above adduced, it is to be remarked that the first recited tradition is not perfectly authentic, *Yehya Ibn Mayeen* having dis-

\* These are different kinds of liquor, extracted from dates, which are more particularly described a little farther on.

puted it;—and with respect to the *second* quoted tradition, the intention of it was merely to explain the LAW, or, in other words, to shew that all liquors extracted from either of the two trees mentioned, being of an inebriating quality, are unlawful as well as *Khamr*.

which is unlawful in any quantity,

KHAMR is in itself unlawful, whether it be used in small or great quantities, the illegality not depending on drinking it to such a degree as to produce *intoxication*. Some of looser principles reject the *absolute* illegality of *Khamr*, alleging that its *effects* only are the cause of its illegality; because the evil of it is, that it creates an inattention towards the worship of God; and as this evil is occasioned only by *intoxication*, it follows that where this does not take place it is not unlawful.—This, however, is gross infidelity, and in direct contradiction to the KORAN, GOD having there termed such liquor *filth*, a thing which is unlawful in its own nature. Besides, the prophet has decreed *Khamr* to be unlawful, according to various traditions; and all the doctors are unanimously of this opinion. It is to be observed, however, that although *Khamr* be unlawful, even in so small a quantity as may not be sufficient to intoxicate, yet the same law does not hold with respect to other things of an inebriating quality; for a little of them, if not sufficient to intoxicate, is not forbidden. *Shafai*, indeed, is of opinion that these are likewise unlawful, in any quantity.

is *filth* in an extreme,

KHAMR is filth in an extreme degree, in the same manner as urine; for the illegality of it is indisputably proved, as has been already shewn.

WHOSOEVER maintains *Khamr* to be lawful is an infidel\*, for he thereby rejects incontestable proof.

\* And consequently becomes exposed to the penalties of apostacy.

KHAMR is not a valuable commodity with respect to *Mussulmans*. If, therefore, it be *destroyed* or *usurped* by any person, there is no responsibility. The sale of it is moreover unlawful; for GOD, in terming it *filth*, manifested a detestation of it; whereas, if it had been a commodity of value, some respect would have been shewn to it.— Besides, it is recorded in the traditions, that “ *he who prohibited the drinking of it, did likewise prohibit both the sale of it and the use or enjoyment of the price of it.*”

and cannot constitute property with a *Mussulman*,

If a *Mussulman* be indebted to another, and wish to discharge the debt with the price of *Khamr*, in that case both the payment and receipt is unlawful, because such price is produced from an illicit sale, and is considered either as an usurpation or a trust in the *Mussulman*'s hands, according to the different opinions of the doctors on this subject; in the same manner as in the case of the sale of carrion. If, on the contrary, the debtor be a *Zimnee*, it is lawful for his *Mussulman* creditor to receive such payment; as the sale of *Khamr* is legal amongst *Zimnees*.

nor be employed in the discharge of his debts,

It is unlawful to derive any use from *Khamr*, either as a medicine, or in any other manner; because the use of *filth* is forbidden; and also, because abstinence from it is enjoined; and this injunction could not be observed in case of its use being allowed.

or used by him,

WHOEVER drinks *Khamr* incurs punishment, although he be not intoxicated; for it is said, in the traditions, “ *Let him who drinks KHAMR be whipped;—and if he drink it again, let him be again in the same manner punished.*” The whole of the companions are agreed upon this point; and the number of stripes prescribed is eighty, as has already been shewn in treating of *punishments*.

and the drinking of which, in any quantity, induces punishment,

If a person boil *Khamr* until two thirds of it evaporate, it is not thereby rendered lawful. If, however, a person drink of it after such

(unless it be boiled:)



such process, he is not liable to punishment, unless he be intoxicated.

but it may be  
converted  
into vinegar.

It is lawful to make vinegar of *Khamr*. *Shafëi*, however, holds a different opinion.

II. *Bàzik*,  
(the boiled  
juice of the  
grape,) term-  
ed (when  
boiled away  
to one half)  
*Monissaf*.

Thus much with respect to *Khamr*, the first in order of prohibited liquors.—The second species of prohibited liquor, is the juice of grapes boiled until a quantity less than two thirds evaporate. This is denominated *Bàzik*. It is also termed *Monissaf*; but that is only where exactly one half of it evaporates in boiling. This kind of liquor is unlawful, according to all our doctors:—according to the two disciples, when it only ferments and becomes spirituous;—and according to *Hà-mæsa*, when it foams and settles. *Ooxrài* has said that *Monissaf* is lawful; (and several of the tribe of *Mutazali*\* have seconded this opinion;) because it is a good liquor, or, in other words, is pleasing to the palate; and also, because it is not *Khamr*. The argument of our doctors is, that as *Monissaf* is pure, and equally delicious with *Khamr*, a number of the idle and dissolute are consequently tempted to drink it; and it is therefore prohibited, with a view to prevent that dissipation which it is found to occasion.

III. *Sikkir*,  
(an infusion  
of dates.)

THE third species of unlawful liquor is termed *Sikkir*; and is made by steeping fresh dates in water until they take effect in sweetening it; when it is both *unlawful* and *abominable* to drink of it. *Shareek-Ibn-Abdoola* alleges that it is lawful, as God, speaking of his bounty in the KORAN, says “YE ENJOY *Sikker* FROM THE GRAPE AND THE “DATE;” whence we may infer that it is allowable, as *bounty* cannot apply to any thing unlawful. The argument of our doctors is the concurrent opinion of all the companions upon this point; and with

\* A particular heretical sect of the *Mussu'mans*. (See *Sales*' Preliminary Discourse, Sect. 8.)

respect

respect to the text above cited, it has a reference to a *particular period*, having been revealed in the infancy of the religion of *Islam*, when all sorts of spirituous liquors were lawful.

THE fourth species of prohibited liquors is *Nookoo-Zabeeb*\*, that is, water in which raisins are steeped until it become sweet, and is affected in its substance. This kind is, however, lawful when merely it possesses a *sweet quality*;—and is prohibited only when it ferments and becomes spirituous. *Oozrâi* is of a different opinion regarding this liquor likewise.

IV. *Nookoo Zabeeb*, (an infusion of raisins.)

It is to be observed that the illegality of these liquors, namely, *Bâsik*, *Monissaf*, and the *Nookoo* of dates and raisins, is inferior to that of *Khamr*. If, therefore, any person hold these lawful, still he is not deemed an infidel. It is otherwise in the case of *Khamr*; for, with respect to the liquors here mentioned, the illegality is a mere matter of opinion; whereas, with regard to *Khamr*, the illegality is undisputed. Punishment, moreover, is not inflicted for drinking these liquors, except in a quantity sufficient to produce intoxication; whereas the drinking of one drop only of *Khamr* induces punishment. The *filth* of these liquors, likewise, according to one tradition, is of a *slight* degree, and according to another, of an *extreme* degree; but the *filth* of *Khamr* is of an *extreme* degree, according to *every* tradition. The sale of the liquors in question is lawful, according to *Haneefa*, and a compensation is due from the destroyer of them. The two disciples, on the contrary, hold that the sale of them is unlawful, and that no reparation is due from the destroyer of them; in the same manner as in the case of *Khamr*.—It is unlawful to derive any kind of use from the above mentioned liquors, as they are prohibited. It is related that *Abû Tootaf* holds the sale of any of the aforesaid liquors, excepting

The three last are not so illegal as *Khamr*.—They may be held legal, without incurring a change of infidelity, and may be drank (so as not to intoxicate) without punishment.

They may also be sold, and are a subject of responsibility;

but they must not be used.

\* *Nookoo* signifies water in which any thing is steeped; and *Zabeeb* means raisins.

*Khamr*,

*Khamr*, to be lawful,—if more than one half, and less than two thirds, should have evaporated in the boiling.

MOHAMMED, in the *Jama Sagbeer*, remarks that every sort of liquor excepting those above mentioned is lawful. This opinion, the learned say, is recorded only in the *Jama Sagbeer*, and is not to be found in any other book. It, however, affords an argument that any kind of strong liquor extracted from wheat, barley, honey, or millet, is lawful in the opinion of *Haneefa*, if not drank so as to occasion intoxication; and he, in fact, maintains that punishment is not inflicted even in the case of intoxication. If, therefore, a person intoxicated with these liquors should divorce his wife, it is void, in the same manner as divorce pronounced by a person in his sleep, or by one whose faculties are impaired from the use of opium, or from having drank the milk of a mare in a medical composition. It is elsewhere related, as an opinion of *Mohammed*, that every sort of strong drink, excepting those above specified, is prohibited;—that if a person drink them to intoxication he is to be punished;—and that a divorce pronounced by him when so intoxicated is valid;—in the same manner as holds in the case of liquors; and decrees pass according to this opinion. He has also said, in the *Jama Sagbeer*, that *Aboo Yoozaf* had first declared every sort of wine to be unlawful which fermented and became spirituous, and afterwards remained ten days without spoiling: but that he afterwards adopted the opinion of *Haneefa*. In other words, he first, according to the adjudication of *Mohammed*, deemed all inebriating liquors unlawful; but afterwards adopted the opinion of *Haneefa*. *Aboo Yoozaf* was singular in making it a condition that the liquor should remain ten days without being spoiled. He, however, afterwards receded from this opinion, and gave into that of *Haneefa* and *Mohammed* on this point. In the *Abridgement* [of *Kadoorie*] it is said, that the steeping of raisins or dried dates, when boiled a little, even so as to become spirituous, may lawfully be drank in such a quantity as not to inebriate, provided it be done without wantonness  
or

or joy.—This is according only to the two *Elders*; for *Mohammed* and *Shafci* deem it unlawful.

THERE is no impropriety in drinking *Kboolteen*; that is, water in which dates have been steeped, mixed with that of raisins, and boiled together until they ferment and become spirituous. This is grounded on a circumstance relative to *Ibn Zeeyád*, which is thus related by himself:—" *Abdoolla*, the son of *Omar*, having given me some *Sherbet* to drink, I became intoxicated to such a degree that I knew not my own house. I went to him next morning, and having informed him of the circumstance, he acquainted me that he had given me nothing but a drink composed of dates and raisins."—Now this was certainly *Kboolteen*, which had undergone the operation of boiling; because it is elsewhere related by *Omar* that it is unlawful in its crude state.

*Kboolteen* (a mixture of the infusion of dates and raisins) may be drank.

LIQUOR produced by means of honey, wheat, barley, or millet, is lawful, according to *Haneefa* and *Aboo Yoosaf*, although it be not boiled,—provided, however, that it be not drank in a wanton or joyful manner. The argument they adduce is the saying of the prophet " *KHAMR is the product of these two trees*;" (meaning the *vine* and the *date*;)—that is to say, he confined the prohibition to these two trees, as his intention was to explain the LAW.—It is to be observed that several of the learned have made the boiling of these liquors a requisite towards their legality. Others, on the contrary, hold it to be no way necessary; (and such is the opinion recorded in the *Mabsoot*;) because these liquors are not of such a nature that a little induces a wish for more, whether they be boiled or crude. It has likewise been disputed whether a person who gets drunk with any of these liquors is to be punished. Some have said that he is not. The learned in the LAW, however, have determined otherwise; for it is related by *Mohammed* that punishment is to be inflicted on whoever is intoxicated with any of the aforesaid strong liquors; for this reason,

Liquors produced by means of honey or grain are lawful;

but any person drinking them to intoxication incurs punishment.

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that

that in the present age they are as much sought for by the dissolute as other liquors were formerly; nay even more so.—The same law holds with regard to strong drinks extracted from milk. Many have said that any drink made from the milk of a mare is unlawful, in the opinion of *Haneefa*, because it is derived from the flesh, which (according to him) is unlawful. Lawyers, however, remark it as the better opinion that the milk is not unlawful according to *Haneefa*; for although he have pronounced the flesh to be abominable, yet the reason is either because, if it were otherwise, the means of conquest would thereby be destroyed; or because the horse is a noble animal; neither of which reasons hold with regard to the *milk*.

*Mosfillis*  
(grape juice  
boiled down  
to a third)  
is lawful.

If the juice of grapes be boiled until two thirds of it evaporate, (being then termed *Mosfillis*,) it becomes lawful, according to the two *Elders*, notwithstanding it be spirituous. *Mohammed*, *Shafei*, and *Malik*, say otherwise. (This difference of opinion, however, exists only on the supposition that it is used with a view to strengthen the constitution; for if it be drank from pleasure or joy they are unanimous in judging it unlawful.) *Mohammed*, *Shafei*, and *Malik*, in support of their opinion, have cited a saying of the prophet, “Every inebriating drink is *KHAMR*; and whatever in excess produces intoxication is prohibited, even in moderation;” and in another place, “Any drink of which one cupful occasions intoxication, is unlawful in a single drop.”—Another argument is, that every inebriating liquor tends to stupify the senses, and is consequently prohibited either in a small or large quantity, in the same manner as *Khamr*. The two *Elders*, in support of their opinion, have quoted the saying of the prophet, “*KHAMR* is unlawful in its very nature;” and in another place, “Little or much of it is alike unlawful; and inebriation from every other strong drink (that is to say, every kind besides *Khamr*) is forbidden.” Now since the prophet has specified intoxication as a condition with respect to other drinks than *Khamr*, we may conclude that on that circumstance only their illegality depends. Besides, a stupefaction

stupefaction of the senses takes place only when liquors are used in such excess as to inebriate, which is allowed to be illegal. A little, therefore, of any strong drink other than *Khamr* is never illegal, except when, on account of its fineness or purity, a little of it invites to more,—in which case the law regards every quantity of it in the same light. This, however, is not the case with *Mosfills*, a little of which, because of its thickness, does not induce a wish for more; and which, in its substance, is food,—wherefore when used in a moderate quantity it retains its original legality\*.

If a little water be poured into *Mosfills* to render it fine, and it be afterwards boiled for a short time, it is still *Mosfills*, the addition of water tending only to weaken it.—It is otherwise where water is mixed with crude juice, and this mixture is then boiled until two thirds of it evaporate; for here, either the water purely evaporates altogether, or it evaporates jointly with the juice; and in either case it is plain that two thirds of the pure juice of the grapes or dates does not evaporate, which is requisite to render it a legal drink.

General rule with respect to it.

If grapes be first boiled, and afterwards pressed until their juice be extracted, in that case a very little more boiling is sufficient to render the drinking of the liquor lawful, according to one tradition of *Haneefa*. According to another tradition it does not become lawful until two thirds of it evaporate in boiling; and this is the better opinion; because the juice remaining within the film, and not being in any manner affected by the boiling, it is consequently similar to juice which is not boiled.

Rule in the boiling of unpressed grapes.

\* By original legality *Haneefa* alludes to an opinion he maintained in opposition to *Malik*, that every thing is originally lawful in its nature, being rendered otherwise only by the prohibition of the sacred writings;—whereas *Malik* holds every thing to have been originally unlawful, until sanctified by the KORAN.

or grapes  
mixed with  
dates.

IF fresh or dried grapes, being mixed with dates, be then boiled, two thirds of the mixture must evaporate before it becomes lawful; for although, with respect to dates, a *small* boiling be often sufficient, yet with respect to the juice of grapes two thirds are always required to have evaporated in boiling. The same rule also holds where the juice of grapes is mixed with the water in which dates have been steeped. If, however, dried grapes, being mixed with the water of dates, should be boiled for a little; and afterwards some dates or dried grapes be thrown into it, in that case, provided the quantity thrown in be small, and not so much as is generally used to make *Nabeex*, it is lawful. It is otherwise, indeed, if the quantity be not small;—in the same manner as where a pot of the water of dates or raisins is mixed with the boiled juice. Still, however, the person who drinks it is not subject to punishment, because its illegality is adjudged merely on principles of *caution*; and endeavours must always be used to avoid the infliction of *punishment*.

Liquor,  
having once  
acquired a  
spirit, is not  
rendered law-  
ful by boiling.

IF *Khamr*, or any other spirituous liquor, be boiled until two thirds of it evaporate, still it is not lawful; for the illegality of it, which was previously established, is not removed by boiling.

Rule with re-  
spect to the  
use of vessels.

THERE is no impropriety in squeezing juice into pots or vessels of a green colour, or of which the interior part has been varnished with oil. The reason of this is, that formerly, in the infancy of the *Mussulman* religion, it was customary to keep *Khamr* in such vessels; and, on this account, when *Khamr* was rendered illegal, the prophet prohibited the use of them likewise, that the greater caution might be observed. He afterwards, however, permitted the use of them, seeing that the vessels of themselves did not render any thing unlawful. If, therefore, *Khamr* have been kept in these vessels, it is necessary they be washed before they are applied to use.

If

If a vessel be old, it becomes clean by three washings: but if it be new it can never be cleansed, in the opinion of *Mohammed*; for then the wine penetrates, and makes a deep impression in it; contrary to the case of an old one. *Abou Yoozaf* holds that it may be cleansed by washing it thrice, and drying it after each washing.—Several have said that, in the opinion of *Abou Yoozaf*, the mode of cleansing it is by filling it with water, and letting it remain for a short time; and then emptying it and filling it again; and so repeating this process until the water poured out be perfectly pure; when the vessel is clean.

WHEN *Khamr* is converted into vinegar, it is then lawful, whether it have been made so by throwing any thing into it, (such as salt or vinegar,) or have become so of itself.

*Vinegar may be made from Khamr,*

VINEGAR made of *Khamr* is not abominable. *Shafei* maintains that it is abominable; and that all vinegar obtained from *Khamr* by means of some mixture is unlawful.—With respect, however, to such as turn so from *Khamr* of itself, he has given two different opinions.

WHEN *Khamr* is changed into vinegar, the vessel in which it is contained becomes clean according to the quantity of the *Khamr*. With regard to that part of the vessel that was empty, several have said that it also becomes clean, as being dependant on the other: but others have said that, as it is battered over with dried *Khamr*, it does not become clean until it be washed with vinegar, when it is immediately purified. In the same manner also, if *Khamr* be poured out of a vessel, and the vessel be then washed with vinegar, it becomes (as lawyers have said) instantaneously clean.

and the vessel in which it is so made becomes pure.

It



Rules with  
respect to the  
dregs of  
*Khamr*.

It is abominable to drink the dregs of *Khamr*, or to use it in combing the hair, as some women do; for the dregs are not entirely void of the particles of *Khamr*, and it is unlawful to apply any unlawful thing to use;—whence the illegality of using it in healing a wound, or applying it to a sore on the back of a quadruped.—It is also unlawful to administer it to an infidel or an infant; and whosoever does so is chargeable with the crime of it. In the same manner, it is unlawful to give it to a quadruped to drink.—Concerning this point, however, several have said that although it be unlawful to carry *Khamr* to a quadruped, yet if the animal, being brought to it, should drink of it, there is no impropriety;—in the same manner as in the case of a dog and carrion; that is to say, carrion must not be thrown to a dog; but if a dog be carried to where carrion is, he may, without any impropriety, be suffered to eat it.

It is allowable to mix the dregs of *Khamr* with vinegar. In this case, however, it is required, that the vinegar be carried to the place where the dregs are, and be there mixed, for otherwise it is unlawful.

A PERSON who drinks the dregs of *Khamr* without being intoxicated is not liable to punishment. *Shafei* is of a different opinion; for in this case several of the particles of *Khamr* must necessarily be drank likewise. Our doctors, on the contrary, argue that as the dregs of *Khamr* are disagreeable to the palate, a little of it does not, by consequence, beget an inclination for more; and thus, being like other strong drinks, the drinking of a little, unless it be attended with intoxication, is not punishable.

An injection  
of *Khamr* is  
unlawful, but

AN injection of *Khamr* into the *anus* or *penis* is unlawful, as being a benefit derived from an unlawful article. It is not, however,

ever, *punishable*, as punishment is inflicted only in the case of *drinking* it. not *punishable*;

If a person throw *Khamr* into soup, it is not then lawful for him to eat the soup, because of its being rendered impure. Nevertheless, if he eat it he is not liable to punishment, for in this case the *Khamr* is as it were *boiled*. and so likewise a mixture of it in viands.

If a person knead flour with *Khamr*, in that case it is unlawful to eat the bread or paste so made, as many of the particles of the *Khamr* still remain in it.

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## S E C T I O N.

### *Of boiling the Juice of Grapes.*

IN boiling the juice of grapes there are three principles.—The first principle is, that whatever quantity may run over the pot from the agitation in boiling, or from the foaming of the juice, is not taken into account, but is considered as not having belonged to it; and the residue is to be boiled until two thirds of it evaporate, in order that the remaining third may be rendered lawful. To illustrate this:—suppose a person inclined to boil ten cups of juice; in that case, if one cup be lost from its boiling over the pot, he must boil the remainder until six cups have evaporated and three remain in the pot, when it becomes lawful. There are three general principles to be observed upon this subject.

THE second principle is, that if water be first poured into the juice, and the whole be then boiled, and the water, on account of its subtlety, be soon wasted, it is requisite that whatever remains after the evaporation [of the water] be boiled until two thirds of it be wasted. If, on the contrary, the water and juice evaporate together, it is in that case requisite that the mixture be boiled until two thirds of the whole evaporate, that the remaining third may be rendered lawful; for here the third of the mixture of water and juice which remains becomes the same as if, a third of the pure juice having remained, water had then been poured into it. To exemplify this:—suppose a person should mix ten cups of juice with twenty cups of water;—in that case, if the water purely evaporate, the mixture must be boiled until a ninth of it remain, which is equivalent to one third of the pure juice;—whereas, if the juice and water evaporate conjunctly, the whole must then be boiled until two thirds of it evaporate.

If juice be boiled with fire\*, at one or several different times, before it be inebriating or prohibited, it is lawful. If, also, the juice, being taken from the fire, should continue to boil until two thirds of it evaporate, it is lawful, as in this case the evaporation is the effect of the fire.

THE third principle is, in boiling juice, after part of it has evaporated, and part has likewise been poured out,—to know how much more must evaporate, that the remaining part may be rendered lawful;—and, in order to this, the following rule must be observed.—The quantity which remains after part has been poured out must be multiplied by the third of the whole; and this sum being divided by the quantity which remains after part of it only has evaporated,

\* The common method of making strong drink, among the *Asiatics*, is by fermenting the juice in the sun.

the

the quotient is the quantity that is lawful. Thus, if a person boil ten cups of juice, and after one cup had evaporated, three cups more should be poured out; then three cups and one third (the third of the whole) being multiplied into six, the number which remains after the loss of evaporation and pouring out amounts to twenty, and this sum being divided by nine, there remains two cups and two ninths; the quantity which is lawful, when the rest has evaporated.

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*H E D A Y A.*

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B O O K XLVII.  
*Of H U N T I N G.*

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S E C T. I.

*Of catching Game with Animals of the HUNTING TRIBE, such as  
Dogs, Hawks, &c.*

It is lawful  
to hunt with  
all animals of  
the hunter

**I**T is lawful to hunt with a trained dog, a panther\*, a hawk, a falcon, and in short with every animal of the hunter tribe that is *trained*. It is related in the *Jama Sagbeer* that game caught with a

\* *Yuz.*—It is an animal of the *leopard* or *lynx* species, hooded and trained to catching game, nearly on the same principle as the hawk.

*trained* animal of the hunter tribe, whether bird or beast, is lawful; but that, caught with any other animal it is not lawful, unless when taken alive, and slain by *Zabbah*. This doctrine is established by a text of the KORAN, in which mention is made of trained dogs. The term *Kalb* [dog] comprehends, in its general acceptation, every carnivorous animal, even to a tiger\*. It is, however, related as an opinion of *Abou Roofaf*, that tigers and bears are excepted, as neither of them hunt for others,—the tiger because of his ferocity, and the bear because of his voraciousness. Some of the *kite* tribe have likewise been excepted because of their voraciousness; and the hog has been excepted because it is essential filth, and because it is unlawful to derive any advantage from it. It is to be observed that it is a condition of the lawfulness of game that the animal which takes it be of the hunter tribe, and trained; and also that the master let slip † the animal in the name of God; for it is so related in a tradition of *Audee*, the son of *Hàtim Tàì*.

tribe that are  
duly *trained*.

THE sign of a dog being trained is, his catching game three times without eating it; whereas the sign of a hawk being trained is, merely, her returning to her master, and attending to his call. These signs are adopted from *Abdoolla Ibn Abafs*. The body of a hawk, moreover, is not capable of enduring blows; but as, on the contrary, the body of a dog has this capability, a dog is therefore to be beaten until he desist from eating the game. Besides, one sign of being trained is, to desist from that which custom and habit have made agreeable; and as it is the custom of a hawk to be wild and to fly from man, it follows that its paying attention to its master's call, and shewing no wildness, is a sign of its being trained. With respect to a *dog*, on the contrary,

Rules for as-  
certaining  
whether a  
dog, &c. be  
duly trained.

\* Arab. *Affid*; including *lions*, and every other creature of the feline tribe, except the *panther* before mentioned.

† The expression, in the original, signifies *to send off*.—It here means the act of *casting off* the hound or hawk, and hunting them at the game.

he is attached to man; but his custom is to tear and eat; and consequently, when he preserves game and does not eat it, it is a sign of his being trained.—It is to be observed that the condition here recited, of a dog desisting, and not eating three times, is the doctrine of the two disciples; (and there is also one tradition from *Haneefa* to the same effect; )—and the reason of it is that, in less than three times there is a probability of the dog's forbearance having proceeded from satiety or some such cause; but that when he desists from eating for three different times, it is a proof that such forbearance has become a custom; for this particular number of *three* is the established standard for experiments, and for the discovery of an evasion,—in the same manner as it is used in determining the period of an option. It is also recorded to have been adopted in the story of *Moses* and *Khizzir* \*; for *Khizzir*, upon the third instance, said, “ Now there is a separation between “ you and me.” Another reason is that plurality is a sign of knowledge; and as *three* is the smallest number of plurality †, it has therefore been adopted as the standard. In the opinion of *Haneefa*, however, as recorded in the *Mabsoot*, a training does not take place, so long as the hunter does not conceive the animal to be trained;—and he holds it improper to fix on the number *three*; because the fixing on a particular number cannot be done by the forethought of man, but must be regulated by the precepts of the sacred writings; and as no precept has been issued on this head, it is proper to consign it to the judgment of him who is best acquainted with the matter, namely, the hunter. According to a former tradition, *Haneefa* holds the game of the third time to be lawful;—whilst the two disciples maintain that it is not lawful, as the animal does not become trained until after the third time; and consequently the game of the third time is the game

\* This story (of which an explanation was given to the translator) is probably the original of *Parnell's Hermit*.

† The *Arabs*, having a *dual* number, do not of course admit two to constitute a plurality.

of

of an untrained animal, and, as such, is unlawful; this being like the act of a slave in the presence of his master; in other words, if a slave perform any acts in the presence of his master, such as purchase or sale, and the master, seeing and knowing the same, remain silent, the slave in that case becomes *licenced*,—not only with respect to the act in question, but also with respect to every act which he may afterwards perform;—and so likewise in the case in question. The reasoning of *Haneefa* is, that when the animal takes the game the third time, and instead of eating preserves it, this argues it to have been trained at the time of taking the game, and consequently the game of the third time is the game of a *trained animal*.—It is otherwise in the case above cited, because *licence* is a notification, and cannot take place without the knowledge of the slave; and the slave cannot acquire this knowledge until *after* he has performed the act, and his master remained silent.

If a person let slip his trained dog, or his trained hawk, and at the time of letting them slip repeat the name of God, or omit it from forgetfulness, and the dog or hawk catch the game, and wound it so that it dies, the game may in that case lawfully be eaten.—If, however, he should *wilfully*, and not from *forgetfulness*, omit the name of God, it is not then lawful to eat the game so taken. It is mentioned in the *Zâhir Rawâyet* that the wounding of the game is a condition of its lawfulness, as it furnishes the means of a *Zabbah Ixtirâree*. (The meaning of *Zabbah Ixtirâree* has already been explained in treating of *Zabbah*.)

The *invocation* must be repeated (or, at least, must not be *wilfully* omitted) at the time of letting slip the hound, &c.

If a dog or panther eat any part of the game, it is unlawful to eat of such; but if a hawk eat part of it, it may lawfully be eaten.—The distinction between these two cases has already been explained.

A hunting *quadruped* eating any part of the game renders it unlawful.

IF



If a dog (for instance) catch game several times without eating it, and afterwards catching game eat part of it, such game cannot lawfully be eaten, as the circumstance of the dog eating it is a proof that he has not been properly trained. In the same manner also, the game which he may afterwards take is not lawful until he shall have been trained anew, concerning which the same difference of opinion obtains as that already set forth concerning a training in the *beginning*. With respect to the game previously taken by him, illegality does not attach to such parts of it as have been eaten, since there the *subject* no longer remains; but with respect to such parts as have not been preserved, (that is, have been left upon the plain,) they are unlawful according to all our doctors. As to what may have been preserved, (that is, what the hunter may have carried to his own house,) it is unlawful, according to *Haneefa*. The two disciples maintain it to be lawful; for they contend that the circumstance of the dog eating at that time is no argument of his not having been previously trained, as an art may be acquired and afterwards forgotten. The argument of *Haneefa*, on the contrary, is that the dog's eating of the game at that period is a proof of his never having been properly trained from the first.

Game caught  
by a hawk,  
after it has  
returned to  
its wild state,  
is not lawful.

If a hawk fly from its master, and remain for a while in a state of wildness and flight, and afterwards catch game, such game is not lawful, as the hawk in that state is not *trained*; for the sign of being trained is to return to its master; and as it did not so return, the sign no longer remains; whence it is considered in the same light as a dog which eats his game.

A dog does  
not render his  
game unlaw-  
ful by taking  
its blood;

If a dog eat the *blood* of his game, and not the *flesh*, the game is lawful, and capable of being eaten, as the dog has preserved it for his master, which argues him to have been well trained, since he eat merely what was unfit for his master, and preserved what was fit for him.

If

IF a hunter, having taken the game from his trained dog, cut off a piece of it, and throw it to the dog, and the dog eat the same, still the remaining part of it is lawful, as it is not then game; the case being, in fact, the same as if a person were to throw to a dog any other kind of food. The law is the same where a dog leaps upon his master, and takes from him part of the dead game in his hands and eats it; this being similar to where a dog attacks his master's goat, and kills it, which is no proof of the dog's not being *trained*.

or by eating a piece of the *flesh* cut off and thrown to him by the hunter.

IF a dog lay hold of game with his teeth, and having bitten off the part eat it, and afterwards catch the game and kill it, without eating any other part of it, the game is unlawful; because upon the dog eating part of his game it becomes evident that he is not *trained*. If, on the contrary, he drop the part bitten off, and having pursued the game kill it and deliver it up to his master without eating any part of it, and having afterwards passed by the part bitten off eat the same, the game is lawful; for as, if the dog, under these circumstances, had eaten part of the body of the game in the hands of his master it would have been of no consequence, it follows that it is, *a fortiori*, of no consequence where he eats what was separated from it, and unlawful to the master to eat. It is otherwise in the former case; because there the dog eat in the very act of hunting; and also, because the tearing off a piece of flesh with the teeth admits of two explanations; for first, this may be done with a view to devouring,—and secondly, it may be done with a view merely to weaken the animal, in order the more easily to catch it;—and the eating of the piece before catching the animal argues the *first* of these,—whereas the eating of it after catching and delivering the game to the hunter argues the *second*, whence no inference can be drawn that the dog is not *trained*.

Case of a dog biting off a piece in the pursuit of his game.

IF a hunter take game alive which his dog had wounded, it is incumbent upon him to slay it according to the prescribed form [of *Zabbah*,]

Game taken alive must be slain by *Zabbah*.

*Zabbab*,] and if he delay so doing until it die, it is then carrion and incapable of being eaten. The law is the same with respect to game taken by a hawk, or the like; and also with respect to game shot by an arrow. The reason of it is, that in this case the hunter is capable of the *original* observance, namely, *Zabbab Ikhtiàree*, before the occurrence of the necessity for the *substitute*, namely, *Zabbab-Ixtiràree*; and therefore the validity of the substitute is annulled. This law, however, supposes a capability in the hunter to perform the *Zabbab*; for where he takes the game alive, and is incapable of performing the *Zabbab*, and there exists in the animal more life than in one whose throat has been just cut, such game (according to the *Zâbir Rawâyet*) is not lawful. It is related, as an opinion of *Haneefa* and *Aboo Yoosaf*, that it is lawful; (and this opinion has been adopted by *Shafeï*;) because the hunter is not in this case capable of the *original* observance, and is therefore in the same situation as a person necessitated to use sand instead of water, notwithstanding he be in sight of water. The reason alleged in the *Zâbir Rawâyet* is, that the hunter's finding the animal alive is equivalent to his capability of performing the *Zabbab*, since it enables him to reach the throat of the animal with his hand. Hence he has, in a manner, the power of performing the *Zabbab*, which he neglects. It is otherwise where only as much life exists in the animal as in one whose throat has been cut; because it is then, in effect, dead,—whence it is that if, in that state, it should fall into water, it is not unlawful, any more than if it had fallen into water when actually dead, the dead not being a fit subject for *Zabbab*. Some of the learned have entered more particularly into this case, alleging that if the inability to perform the *Zabbab* arise from the want of an instrument, it is not then permitted to eat it; and that if the inability arise from the want of time, in that case likewise it is not permitted to eat it, according to our doctors,—in opposition to the opinion of *Shafeï*. The argument of our doctors is, that when the animal is taken alive it is no longer game, because the term *game* is applicable only to what is *wild* and *free*; and that therefore the *Zabbab Ixtiràree* is

is then of no effect. What is here recited proceeds on the supposition of the animal being taken alive, and of there being a possibility of its continuing to live; for if there be no possibility of its continuing to live, (as where its belly has been torn, and part of its entrails have come out,) it may lawfully be eaten without the performance of *Zabbab*, because the life that remains in it is equivalent only to the struggling of an animal whose throat had been cut, and is consequently of no effect;—in the same manner as where a goat falls into water, after having had its throat cut.

If the hunter find the game alive, and do not take it from his dog till it be dead, and there have been sufficient time, after he found it alive, to perform the *Zabbab*, it is not in that case lawful to eat it; because this is equivalent to an omission of the *Zabbab*, notwithstanding an ability to perform it. If, on the contrary, he had found it alive at a period when, if he had taken it, there was not sufficient time to perform the *Zabbab*, it is lawful.

provided it live long enough to admit of performing this ceremony.

If a hunter let slip his dog at game, and the dog take some other game, the game so taken is lawful. *Málik* has said that it is not lawful, since the dog took this game without having been let slip at it, as it was at another specific animal that the hunter let him slip. Our doctors, on the other hand, argue that the object of the hunter is merely the acquisition of game; and all game is the same to him. Besides, the specification of the particular animal is of no advantage, as it is impracticable to teach a dog to take that particular animal.

The game taken is lawful although it be not the same that was intended by the hunter.

If a person let slip a panther at game \*, and the panther lie for a while in ambush, and then catch and kill the game, it is lawful to

Rule in casting off a panther at game.

\* The *lynx* or *panther* used in hunting is generally kept hooded, and is conveyed from place to place upon a sort of litter. When the hunters have approached within sight of their game, they unhood the panther and cast off his chains, and he instantly springs at his prey, if within his reach, or if otherwise, practises a variety of stratagems to get near to it.

eat it; because the lying in ambush being with a view to catch the game, and not to take rest, does not of consequence terminate the act of letting it slip. The same rule also holds with respect to a dog, when trained in the manner of a panther.

All the game caught by the dog, &c. under one invocation, is lawful. Rule for determining this with respect to dogs,

If a dog be let slip at game, and take and kill it, and afterwards take and kill other game, both are lawful; because the act of letting him slip continues to operate, and is not terminated until after the taking of the second game; this case being similar to that of a person shooting at an animal with an arrow, which not only hits and kills it, but also hits and kills another. If, on the contrary, the dog, after killing the first game, lie down upon the ground and rest for a long time, and then, some other game passing by, he rise up and kill it, it is not lawful to eat that other game; because when the dog lay down and took rest, he thereby determined the act of letting him slip, since his sitting down was with a view to take rest, and not to deceive the game; in opposition to what was before recited.

and hawks.

If a hawk, being let slip [cast off] at game, first perch upon something, and afterwards, going in quest of the game, take it and kill it, it is lawful to eat it. This, however, proceeds on the supposition of the hawk neither tarrying long, nor with a view to rest, but merely a short time, and with a view to *surprize* her prey.

Game is not lawful when caught (by a hawk, &c.) independant of the act of the hunter.

If a trained hawk catch game and kill it, and it be not known whether any person let her slip at such game, it is then unlawful to eat it; because in this case a doubt exists with respect to the *letting slip*; and game is not lawful unless the animal which takes it be let slip at it.

It is requisite to its legality (when caught dead) that

If game be *strangled* by a dog, and not *wounded*, it is not lawful to eat it; because the *wounding* of it is a condition of its legality, according to the *Zâhir Rawâyet*, (as has been before mentioned;) and this

this condition implies that where merely particular members of the game are broken by the dog it is not lawful to eat it.

blood have been drawn from it.

IF a trained dog be assisted in killing the game by a dog that is not trained; or by a dog belonging to a *Magian*, or by one upon which the invocation had been wilfully omitted, in that case the game is unlawful; because two causes are here united, namely, a cause of legality, and a cause of illegality, and caution dictates a preference to the cause of illegality.

Game is rendered unlawful by the conjunction of any cause of illegality in the catching of it.

ANY person not permitted to perform *Zabbab* (such as an apostate, a *Mohrim*, or a person who wilfully omits the invocation) is the same as a *Magian* with respect to letting loose an animal of the hunter tribe.

Game hunted down by any person not qualified to perform *Zabbab* is unlawful.

IF a dog, without being let slip, should of himself pursue game, and a *Mussulman* repeat the invocation, and then make a noise and incite the dog to run faster, and the dog catch the game, it is in that case lawful to eat it.

IF a *Mussulman*, having repeated the invocation, let slip his dog at game, and the dog having pursued and caught the game, and thereby rendered it weak, let it go, and afterwards catch it a second time and kill it, it is in that case lawful to eat it;—and so likewise where a *Mussulman* lets slip two dogs, and one of them renders the game weak, and the other kills it;—and also, where two men let slip their dogs, (that is, each of them one dog,) and one of the dogs renders the game weak, and the other kills it. In this last case, however, the game is the property of him whose dog rendered it weak; because he deprived it of the quality of game, as he disabled it from running.

Game killed at a second catching of it (either by the same or a second dog) is lawful.

## SECT. II.

*Of shooting Game with an Arrow\*.*

Game slain  
by a hunter  
shooting, &c.  
at random, on  
hearing a  
noise, is law-  
ful, provided  
the noise pro-  
ceed. from  
game.

If a person hear a noise, and, imagining it to be that of game, shoot an arrow, or let slip his dog or hawk, and in either case game be killed, and it be afterwards discovered that the noise did actually proceed from game, it is then lawful to eat the game so killed by the arrow, dog, or hawk, whether it were the game of which the noise was heard, or not; because the object of the hunter was merely *to get game*, of whatever kind. This is according to the *Zdhir Rawāyet*.—It is related as an opinion of *Abū Yūsuf*, that a hog is in this case an exception;—in other words, if it be afterwards known that the noise proceeded from a *hog*, the game killed by the arrow, hawk, or dog, is not lawful; because a hog is in an excessive degree impure;—whence it is that no part of it is rendered allowable by hunting:—contrary to other quadrupeds, for of those the skin, by their being hunted, is rendered lawful. *Ziffer* has likewise excepted all those animals of which the flesh is not fit for eating, inasmuch as the hunting of these is not with a view to render them lawful.

Game shot by  
an arrow  
aimed at an-  
other animal  
is lawful.

If an arrow be shot at a bird and hit other game, and the bird shot at fly away, without its being known whether it was wild or tame, the game is in that case lawful, because the probability is that the bird was a *wild* one. If, on the contrary, an arrow be shot at a camel, and hit game, and the camel having escaped, it be not known whether it was a wild one or otherwise, the game in that case is not lawful.

\* The title of this section, in the *Arabic* version, is simply *Rāma*, signifying the use of any missile weapon whatever.

because

because the natural condition of a camel is that of tameness and attachment to man.—If, on the other hand, an arrow be shot at fish or locusts, and hit game, such game is lawful, in the opinion of *Abou Yoozaf*, according to one tradition, inasmuch as it is *game*: but according to another tradition it is unlawful; because hunting is equivalent to the performance of *Zabbab*, which is not requisite with respect to fishes and locusts.

If a person, hearing a noise, and imagining it to be that of a man, should in consequence shoot an arrow, and kill game, and it be afterwards discovered that the noise proceeded from the game, in that case the game so killed is lawful; because, when it actually proves to be *game*, the imagination of the person who shoots is of no consequence.

If a hunter, upon shooting his arrow, repeat the invocation, and the arrow wound and kill the game, it is lawful to eat it; because the shooting of an arrow along with the invocation, and the wounding of the animal, is equivalent to the performance of *Zabbab*. Nevertheless, if the animal be taken alive, it is incumbent to slay it by *Zabbab*, as has been already set forth in the first section.

*Invocation* must be made on the instant of shooting; but if the animal be taken alive, it must still be slain by *Zabbab*.

If an arrow hit game, and the game fly away with the arrow until it disappear, and the hunter go in search of it, and find it dead, it is in that case lawful to eat it. If, on the contrary, he should *not* follow or go in search of it, and afterwards happen to find it dead, it is not in that case lawful; because it is related that the prophet held it abominable to eat that game which disappeared from the sight of the bowman; and also, because there is a possibility that it may have died from some other cause.

Game wounded, and afterwards found dead by the person who shot, is lawful;

If the hunter above mentioned find another wound in the game besides that of his arrow, it is not lawful to eat it, notwithstanding he may

unless he then discover another wound upon it.



may have continued in the search of it until he found it; because in this case two causes are conjoined,—one of illegality, namely, the other wound,—and one of legality, namely, the wound of his arrow; and it is the established custom to give the preference to the cause of illegality. Moreover, caution is easily observed in this case, as it is an uncommon one. All that has been above recited relates to the shooting of an arrow; but it is equally applicable throughout to the letting slip of a *dog*, or so forth.

Game which, being shot, falls into water, or upon any building, &c. before it reaches the ground, is unlawful.

If a person shoot at game with an arrow, and hit it, and it fall into water, or upon the roof of a house, or some other eminence, and afterwards upon the ground, it is not lawful to eat it; because the animal is in this case a *Mootradeea*, the eating of which is prohibited in the KORAN; and also, because there is a suspicion that the death may have been occasioned by the water, or by the fall from the eminence, and not by the wound\*.

Rule with respect to water-fowl.

If a water-fowl be wounded, and the member wounded be not a part under water, it is lawful,—whereas, if it be a part under water, it is not lawful, in the same manner as a *land* bird, which being wounded falls into water.

Game slain by a bruise, without a wound, is not lawful.

GAME hit [stunned] by an arrow without a sharp point is unlawful, as it is so recorded in the traditions. It is to be observed, moreover, that the *wounding* of game is a condition of its legality; because a *Zabbah Iztirâree* cannot otherwise be established,—as has been already mentioned†.

\* Amidst such a mass of frivolous absurdity, the translator thinks it unnecessary to offer any apology for the omission, in this place, of a long discussion still more futile than any thing which has gone before.

† From this, and various preceding passages, it appears that it is requisite to *draw blood* in order to the rendering game lawful.

GAME killed by a bullet from a cross-bow is not lawful, as this missile does not wound, and is therefore like a blunt arrow. A *stone*, also, is subject to the same rule, as it does not wound;—and game is also unlawful when killed by a great heavy stone, notwithstanding it be sharp; because there is a probability that the game may have died from the weight of the stone, and not from the sharpness of it. If, however, the stone be sharp, and not weighty, the game killed by it is lawful, as it is then certain that it must have died in consequence of a *wound* from it.

GAME killed by a small pebble stone, and of which no part has been cut by the stone, is not lawful, because in this case the game is *bruised* and not *wounded*. If, also, game be beaten by a stick or piece of wood until it die, it is not lawful, as the death is then occasioned by the *weight* of the stick or piece of wood, and not by any *wound*: yet if, in this case, the stick or piece of wood, because of their sharpness, occasion a wound, there is no impropriety in eating the game, as the stick and piece of wood are then equivalent to a sword and spear. The general rule, in short, in these cases, is that when it is known with certainty that the death of the game was occasioned by a *wound*, it is lawful food; but unlawful where the death is known with certainty to have been occasioned by a *bruise*, and not a *wound*; and that, in case of the existence of a doubt, (that is, where it is not certainly known whether the death was occasioned by a bruise or by a wound,) it is then also unlawful, from a principle of caution.

IF a person throw a sword or a knife at game, and the game be struck by the *hilt* of the sword, or the *back* of the knife, it is not lawful; whereas if struck by the *edge*, and wounded, it is lawful.

Case of cutting off the head of an animal.

IF a person cut off the head of a goat, it is lawful to eat it, as the jugular veins have been cut through; but it is nevertheless abominable. If, however, a person perform this action by beginning with the spine, so as to occasion the death of the animal before the jugular veins be cut, it is not lawful: but it is lawful if the animal do not die until after the jugular veins are cut.

A Magian, an apostate, or an idolator are not qualified to kill game.

GAME killed by a *Magian*, an apostate, or a worshipper of images, is not lawful, because they are not allowed to perform *Zabbah*, (as has been already explained in treating of that subject,) and *Zabbah* is a condition of the legality of game. It is otherwise with respect to a *Christian* or a *Jew*, because, as their performance of a *Zabbah Ikhtiàree* is lawful, it follows that their performance of a *Zabbah Ixtiràree* must also be lawful.

Case of game wounded by one person, and then slain by another.

IF a person shoot an arrow at game, and hit it, without rendering it so weak as to prevent it from running, and in that state another person shoot at it, and kill it, the game is the property of the second hunter, because he was the person who took it, and the prophet has said, "*Game belongs to him who takes it.*" If, on the contrary, the first hunter render it too weak to run, and another person then kill it, it is in that case the property of the first hunter. Nevertheless, he must abstain from eating it, as there is a probability that it may have died in consequence of the second wound; and as it had not the power of running after the first wound, it ought to have been slain by a *Zabbah Ikhtiàree*, no regard being, in such an instance, paid to the *Zabbah Ixtiràree*, in opposition to the former case.—This prohibition, however, against eating the game, proceeds on the supposition of its being in such a condition as to induce us to believe the continuance of its existence possible; since under these circumstances its death is referred to the second shot: but if the first wound be such as to render the continuance of its existence impossible, (as if it have as little

little life in it as an animal with its throat cut, having, for instance, had its *head* cut off,) in that case it is lawful to eat it, as its death is not then referred to the second shot, it being at that period in a state equivalent to annihilation. If, however, the first wound be such as to render the survival of the game impossible, and there nevertheless be more life in it than in an animal with its throat cut, (as if, for instance, it be capable of living *one day*,) in that case, according to *Aboo Yoosaf*, it is not rendered unlawful by the second shot, because such a degree of life (in his opinion) is of no effect; but according to *Mohammed* it is unlawful, as such a degree of life (in his opinion) is of effect.

IN the foregoing case, the second hunter is responsible to the first for the value which the game bears after receiving the first wound; because he [the second hunter] has destroyed game the property of the first hunter, (who became the proprietor of it in consequence of his wounding it, and thereby incapacitating it from running;) and the game is, by such wound, rendered *defective*; and in all cases of responsibility for destruction of property a regard is paid to the *time* of the destruction. The compiler of the *Hedaya* remarks that in this case there is a distinction;—in other words, responsibility takes place where it is known that the game in question died in consequence of the second wound; (that is, where the wound of the first hunter was such that the animal lived after it,—and the wound of the second hunter such as to destroy the existence;) and the second hunter is accordingly responsible for the value of the game, in its *wounded* and *defective*, not in its *unwounded* and *perfect* state; in the same manner as where a person kills the sick slave of another. If, however, it be known that the game died in consequence of the *first* wound, or if it be uncertain of which wound it died, *Mohammed* has said, in the *Zeeadât*, that it is incumbent upon the second hunter, first to pay a compensation for the damage he may have occasioned to the game by

the wound; and, secondly, to pay a compensation for half the value which the game bore after receiving both wounds; and, thirdly, to pay a compensation of half the value of the flesh. The reason for the first compensation is that the second hunter, having occasioned a damage to an animal which was the property of another, is bound, in the first instance, to make good the amount of that damage. The reason for the second compensation is that, as the animal died of *both* wounds, the second wound must have been the immediate cause of its destruction; and as it was at that time the property of another person, it is incumbent upon him to make a compensation for *half* the value which it bore after receiving both wounds, as the first wound did not proceed from him. (With respect to the damage occasioned by the second wound, having paid it before, he is not required to pay it again.) The reason for the third compensation is that, as the game, after receiving the first wound, was in such a state as to have rendered it lawful by a *Zabbah Ikhtidree*, if it had not received the second wound, it follows that the second hunter, in consequence of the second wound, did render unlawful half of the flesh with respect to the first hunter. He is only required, however, to pay a compensation for one *half* of the flesh, as he paid the other half before, inasmuch as he paid half the *value*, which included the flesh.

Case of game  
first wounded,  
and then  
killed by the  
same person.

IF, instead of *two* persons shooting the game, *one* person shoot the same game *twice*, the law is then the same with respect to the illegality of the game as when it receives two wounds from two different persons;—this being similar to where a person, having shot game upon any eminence, and rendered it weak and feeble, afterwards shoots it a second time, and brings it to the ground,—in which case the game so killed is unlawful, inasmuch as the second wound is the cause of illegality; and so also in the case in question.

THE

THE hunting of every species of animal is lawful, whether they be fit for eating or otherwise; because the legality of *hunting* has been absolutely declared in the KORAN without restricting it to animals fit to eat. Another reason is, that the hunting of animals not fit for eating may proceed either from a desire to obtain their skin, their wool, or their feathers, or from a wish to exterminate them on account of their being mischievous or hurtful; and all these motives are laudable.

All animals  
may be  
hunted.

# H E D A R A.

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## B O O K XLVIII.

### *Of R A H N, or P A W N S.*

Chap. I. Introductory.

Chap. II. Of Things capable of being pawned; and of Things for which Pledges may be taken.

Chap. III. Of Pledges placed in the Hands of a *Trustee*.

Chap. IV. Of the Power over Pawns; and of Offences committed *by or upon* them.

CHAP.

## C H A P. I.

**RAHN** literally signifies to detain a thing on any account whatever. In the language of the LAW it means the detention of a thing on account of a claim which may be answered by means of that thing; as in the case of debt.—This practice is lawful, and ordained; for the word of GOD, in the KORAN, says, “GIVE AND RECEIVE “PLEDGES;”—and it is also related, that the prophet, in a bargain made with a Jew for grain, gave his coat of mail in pledge for the payment.—Besides, all the doctors have concurred in deeming pawn legal; and it is, moreover, an *obligatory* engagement, and consequently lawful, in the same manner as *bail*.

Definition of  
*Rahn*.

CONTRACTS of pawn are established by declaration and acceptance, and are rendered perfect and complete by taking possession of the pledge.—Several of the learned have said that the contract is complete immediately upon the declaration; for as it is a deed purely *voluntary*, it therefore obtains its completion from the voluntary agent alone; as in cases of gift and alms. The seizure of the pledge is, nevertheless, absolutely requisite to the obligation of the deed, as shall be shewn in its proper place. *Malik* has said that a contract of pawn become valid and binding immediately upon the concurrence of the parties; because they relate to the property of both, and are consequently similar to sale.—One of the arguments advanced by our doctors is, the text of the KORAN, as above quoted; and another argument is, that as the act of pledging is purely *voluntary*, (whence it is

Pawn is  
established  
by declar-  
ation and ac-  
ceptance; and  
confirmed by  
the receipt of  
the pledge.



is that there is no *compulsion* on the pawner towards the act,) it must therefore be *effectually* concluded, in the same manner as in the case of legacies;—and a contract of pawn can only be effectually concluded by the seizure, in the same manner as a legacy is effectually concluded by the testator dying without having receded from his bequest. It is to be observed, that if the depositor *relinquish* the pledge to the pawnee, his so doing is equivalent to an acceptance; in other words, his not obstructing the pawnee from taking possession of the pledge is equivalent to his actually investing him with the possession, and is a sufficient proof of his having so done. This is recorded in the *Zâbir Rawâyet*; and the reason of it is, that as the seizure of the pledge is sanctioned in virtue of the agreement, it therefore resembles the seizure of a thing sold. It is recorded from *Abou Yoosaf*, that the seizure of a *moveable* pledge can only be accomplished by the laying hold of, and removing it, not by the pawner's merely relinquishing it, as above mentioned; for the seizure of a pledge is an occasion of responsibility *from the first*, in the same manner as usurpation. The former is, however, the better opinion.

Upon the pawnee taking possession of the pledge, the contract becomes binding;

and he [the pawnee] is responsible for the pledge,

UPON a person receiving a pledge which is distinguished and defined, (that is, unmixed and disjoined from the property of the depositor,) the acceptance being then ascertained, the contract is completed, and consequently binding. (Until, however, the seizure actually take place, the pawner is at full liberty either to adhere to, or recede from the agreement, as the validity of it rests entirely upon the seizure, without which the end and intention of a pledge cannot be answered.) Upon the pledge, therefore, being delivered to the pawnee, and his taking possession of the same, he becomes answerable in case of its being destroyed in his hands. *Shafëi* maintains that a pledge being a *trust* in the hands of the pawnee, if it be destroyed in his possession still he does not on that account forfeit his due; because it is recorded in the traditions, that “*no pledge shall be distrained for debt, and the pawner shall be liable for all risks,*” meaning, (according

(according to *Shafëi*,) that if the pledge be destroyed, still the debt is not annulled on account of any responsibility arising therefrom;—and further, because a pledge being merely a *testimony*, the loss of it does not annul the debt, seeing that a debt still exists after the loss even of a *written bond*; the reason of which is, that the use of taking such a testimony is to add greater security to the pawnee's debt; and therefore if, from the decay or destruction of the pawn or testimony, the debt of the pawnee were cancelled, it would be opposite to the spirit of the agreement, since it would admit a possibility of the pawnee's right becoming extinguished, a thing *repugnant to conservation and security*. The arguments of our doctors upon this point are twofold.—FIRST, a tradition of the prophet, who once decreed the claim of a pawnee to be annulled, on account of the death of a horse which he had in a pledge; (although, indeed, several of the learned, in their comments on this tradition, have remarked, that it was made at a time when the value of the horse could not be ascertained.)—SECONDLY, all the companions of the prophet, and their followers, have declared a pledge to be a subject of responsibility; that is to say, that if it decay in the hands of the pawnee, he sustains the loss.—With respect, moreover, to the assertion of *Shafëi*, that “a pledge “is a trust,” it is inadmissible, as being in direct contradiction to the concurrent opinion of the companions above-mentioned. With respect, also, to the tradition adduced by him as an argument, the real meaning of it is, “that a pledge cannot be completely seized, so as to “render it the absolute property of the pawnee, in the room of his other “claim,” an explication which *Koorokbee* has transmitted to us, as delivered by former sages.—As, moreover, the pawnee is *entitled* to take possession of the pledge as a security for his claim, and to detain it, (for *Rahn*; in its literal sense, signifies detention,) it necessarily follows that a pledge is not a trust.—In short, in the opinion of our doctors, a contract of pawn requires that the pledge be continually detained in the hands of the pawnee in lieu of his debt, in this way,

which he is  
entitled to  
detain until  
he receive

payment of  
his debt,

without ad-  
mitting the  
pawner to any  
use of it.

way, that it remain in his possession as a security for the fulfilment of his claim;—whereas, in the opinion of *Shafëi*, the claim of the pawnee is connected with the *substance* of the pledge, as a *satisfaction* for his claim,—in this way, that he may sell it, and thereby obtain a discharge,—it being until such sale a trust reposed in him, and the property of the depositor;—and agreeably to these different tenets several cases occur concerning which there is a disagreement between our doctors and *Shafëi*:—for instance,—if the pawner be desirous of resuming his pledge for a short time, that he may enjoy the use of it, (as in the case of taking milk from a cow, or so forth,) he is not so allowed, according to our doctors, unless by the consent of the pawnee, as the object of the agreement of pawn (namely, a *constant possession*) would by that means be entirely defeated,—whereas, according to *Shafëi*, a pawner may even *forcibly* take back his pledge for a temporary enjoyment of the use, nor can he be prevented from this; because (in his opinion) a pledge may be sold conformably to the nature of the agreement; and the resumption of it towards an enjoyment of the usufruct cannot be considered as a subversion thereof.—(More cases of this kind shall be exhibited in the sequel.)

The debt to  
which the  
pawn is op-  
posed must be  
actually due.

A CONTRACT of pawn is not valid unless opposed to a debt due at that time; for the end of such contract is to establish possession in order to the *obtaining of payment*; and the *obtaining of payment* presupposes an obligation of debt.

The respon-  
sibility for  
the pledge  
extends to the  
amount of the

A PLEDGE is insured in the possession of the pawnee \* to whatever is the smallest amount,—the debt of the pawnee, or the value the pledge bore at the time of its being deposited. Thus if a pledge equivalent to the amount of the debt perish in the pawnee's hands, his

\* In other words, “*The pawnee is responsible for it.*”

claim

claim is rendered void, and he thereby, as it were, obtains a complete payment. If, on the contrary, the value of the pledge exceed the amount of the debt, the excess is in that case considered as a *trust*, and the whole of the pawnee's claim is annulled, on account of the decay of that part of the pledge which is equivalent to the amount thereof; and the remainder [the excess,] as being held in trust, is not liable to be compensated for, and consequently the pawner sustains the loss of it. If, on the other hand, the value of the pledge be *less* than the debt, the pawnee forfeits that part of his claim only which is equal to the value of the pledge, and the balance, or excess, must be paid to him by the pawner. *Ziffer* maintains that a pledge is liable to be compensated for according to its value;—whence if a pledge of the value of one thousand five hundred *dirms* at the time of delivery be destroyed, and the debt of the pawnee be one thousand *dirms*, the pawner has a claim upon the pawnee for the difference, namely, five hundred *dirms*.—His arguments upon this point are twofold.—FIRST, a saying of *Alee*, “*The pawner and pawnee shall mutually restore to each other the excess, whether the pledge exceed in value the debt, or the debt the pledge.*”—SECONDLY, the amount in which the pledge exceeds the debt being (as well as the sum equivalent to the debt) given in pledge, the excess is of consequence a subject of responsibility as much as that part which is equivalent to the debt. Hence, when the debt is annulled, a restitution must be made of the surplus. The opinion of our doctors upon this subject is adopted from *Omar Farook*, and *Abdoolla-Ibn Masood*. They, moreover, argue, that as the pledge was taken possession of purely for the purpose of obtaining payment it is therefore a subject of responsibility only in that degree of value from which the payment of the debt might have been made, as in the case of a *real* payment, the surplus being pawned merely from necessity, (as it was impossible to have pawned the *exact value* of the debt,) and therefore not demanding restitution.—With respect, also, to the saying of *Alee*, (as quoted by *Ziffer*,) the meaning of it is, that

debt owing to  
the pawnee.

the parties shall mutually return the excess, in case of *sale*, (that is to say, if the pawner *sell* the pledge,) not in case of *destruction*, for he has elsewhere declared the surplus to be held by the pawnee in *trust*.

The pawnee may demand payment of his debt, and imprison the pawner in case of contumacy.

It is lawful for the receiver of a pledge to make a demand of his debt, and even to imprison the pawner in case of refusal; because the claim still exists after the receipt of the pledge, which is not considered as a *fulfilment*, but merely as a *preservative* of it. The pawnee, therefore, is not prohibited from making the demand; and if the circumstance of the evasions and delays of the pawner be made known to the *Kázee*, he must imprison him, as has been formerly explained\*.

It is required of the pawnee, before payment, to produce the pledge;

WHENEVER a pawnee demands payment of his debt, it is requisite that the *Kázee* order him first to produce the pledge; because as he possesses that for the purpose of obtaining payment, it is not lawful for him to take his due at the same time that he retains possession of the pledge, which he holds as a security; since if, in such case, the pledge were to perish in his hands, a *double* payment would be induced, which is inadmissible. And when the pawnee shall have produced the pledge, the *Kázee* must order the depositor first to discharge the debt, in order to ascertain the *pawnee's* right, in the same manner as the right of the *pawner* is ascertained, to the end that both may be placed upon an equal footing; as in the case of bargains, where the seller having produced the goods, the buyer then lays down the purchase-money.

but if he demand payment in a

If the pawnee demand payment in a city different from that wherein the contract of pawn was concluded, and the pledge be of such a

\* In treating of the duties of the KAZER. (See Vol. II. p. 624.)

nature

nature as neither to require charge of carriage or expence, the same rules which have been laid down in other cases hold good in this; as the place for the surrender of a pledge of this kind being entirely immaterial and indifferent, the doctors have therefore assigned no particular rules or conditions regarding it. If, on the contrary, the pledge be of such a nature as to require carriage and charges of removal, the pawnee is not desired to produce it; for such a requisition would necessarily oblige him to have it carried from place to place. It is, moreover, incumbent on him to relinquish the pledge to the pawner, and to allow him to resume it; but he is not required to remove it from one place to another, as that would be a loss to him which he had not stipulated.

*different place,*  
he is not re-  
quired to pro-  
duce it unless  
this can be  
done without  
expence.

... of the  
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If the pawner empower the trustee\* to sell his pledge, and he sell it accordingly, either for ready money or on credit, it is lawful, the power of the pawner to sell it being indisputable. If, therefore, the pawnee afterwards demand payment, he is not desired to produce the pledge, as that, in such case, is not in his power.—The same rule also holds where the pawnee, at the instance of the pawner, having sold the pledge, does not possess himself of the purchase-money; for then the *Kasbe* may compel the pawner to discharge his debt, without requiring the pawnee to produce the pledge, which, because of its having been sold at the desire of the pawner, has become converted into a debt,—wherefore the pawner himself did, as it were, pawn the purchase-money, (that is, the debt.)—If, on the contrary, the pawnee possess himself of the purchase-money, he must in that case

The pledge  
may be sold,  
at the desire  
of the pawner,  
and the pawnee  
cannot afterwards  
be required to  
produce it.

\* Arab. *Adil*; meaning (literally) an *upright* person,—one in whose hands the parties mutually agree that the pledge shall remain until it be redeemed. The translator substitutes the term *trustee* throughout this book, because (although not the literal meaning of *Adil*) it best expresses the sense of the author.

be required to produce it upon demanding his debt; for as the money is a commutation for the pledge, it is therefore a substitute for it. It is to be observed, however, that in the above case the pawnee has a right to the possession of the purchase-money; for as he himself made the sale, the rights of the contract consequently appertain to him.

He must produce it on receiving a *partial* payment, as well as in case of a complete discharge.

IN the same manner as the pawnee is required to produce the pledge when he is about to receive payment of his debt in full, he is also required to produce it when he receives part payment, provided the term stipulated be expired; because his thus producing it can be of no prejudice to him, whilst at the same time it serves to dissipate any apprehension of the loss of the pledge which may have arisen in the mind of the pawner. The pledge, however, is not to be restored until a complete discharge be made. If, also, the pledge should have been *sold* by the pawnee, and the purchase-money taken possession of by him, he is required to produce such purchase-money upon demanding payment of his debt, or of *part* of it, in the same manner as he is required to produce the pledge itself, in case of its being extant, as the purchase-money is a substitute for the pledge.

IF a person should, by misadventure, kill a pawned slave, and the magistrate decree the value of such slave to be made good by the *Akila* of the slayer within the term of three years, the pawner must not be compelled to discharge the pawnee's debt until he [the pawnee] shall have produced the full value of the slave; for, in this case, the value is a substitute for the slave who was in pawn; and it is consequently incumbent on the pawnee to produce the whole of his value, in the same manner as he is required to produce the whole pledge where it is extant. Here, moreover, the pledge has not become converted into value by any act of the pawner;—whereas, in the case formerly stated, (namely, where the pawnee sold the pledge at the desire of the pawner

pawner without possessing himself of the purchase money,) the pledge was converted into debt by the act of the pawner, since he invested the pawnee with a power of disposal. There is consequently an essential difference between these two cases;—whence it is that, in the present instance, it is incumbent on the pawnee to produce the value received for the slave, whereas, in the former case, he is not required to produce the pledge, nor yet its price, as of that he had never received possession.

If the pawner deliver the pledge into the hands of a *trustee*, ordering him, at the same time, to resign it in charge to some one else than the pawnee, and he accordingly do so, in that case the pawnee is not required to produce the pledge upon demanding payment of his debt, for this is rendered impossible, from its not having been intrusted to his care, but to that of another.—If, also, the trustee, having committed the pledge into the hands of one of his relations, should then abscond, and the person to whom it was given acknowledge, upon its being demanded from him, that “he had indeed received it in trust, but was ignorant of the real proprietor,” the pawner may be compelled to discharge his debt, without the pawnee being required to produce the pledge, as he had never received it;—(and the same rule also holds, where the trustee absconds, carrying the pledge along with him, without its being known whither he is gone.)—If, on the other hand, the trustee deny the goods entrusted to him to be a pledge, asserting that “they are his own property,” the pawnee cannot take any thing from the pawner until the contrary be proved; because the denial of the trustee is tantamount to a destruction of the pledge; and when a pledge is destroyed, the pawnee is considered as having received payment of his debt, after which he is no longer at liberty to claim it.

Cases in which he is not required to produce it.

If



The pawner cannot reclaim the pledge on the plea of *selling* it for the discharge of his debt.

If the pawner demand a restitution of the pledge with a view to sell it, and thereby pay off his debt, still it is not incumbent on the pawnee so to do, as the contract of pawn requires that the pledge be continually detained in the hands of the pawnee until such time as his debt be paid.—If, also, the pawner discharge the debt in *part*, still it remains with the pawnee to keep possession until he shall have received payment of the balance: but whenever a complete payment is made, the pawnee must be directed to restore the pledge to the pawner, as the obstacle to his so doing no longer exists, the claimant having obtained his due.

The pawnee must restore what he has received in payment, if the pledge perish in his hands.

If, after the discharge of the debt, the pledge should be destroyed with the pawnee, he must return the money he received in payment; for as, upon the pledge perishing in the hands of the pawnee, he appears to have received payment in virtue of his previous possession of it, he therefore appears to have taken payment *twice*, and consequently must return what he has received. In the same manner, if the pawner and pawnee should, by mutual consent, dissolve the contract of pawn, the pawnee may, nevertheless, keep possession of the pledge until such time as he receive payment of his debt, or exempt the pawner therefrom.

The contract is not dissolved until the pledge be restored.

A CONTRACT of pawn is not rendered void until the pawnee restore the pledge to the pawner, according to the prescribed mode of annulment.

The debt is discharged by the loss of the pledge.

If the pledge perish in the hands of the pawnee, after the parties have in concert dissolved the contract, his debt is in that case considered as discharged, provided the value of the pledge be adequate to it, the agreement being still held in force.

It

It is not lawful for the pawnee to enjoy, in any shape, the usufruct of the pledge.—If, therefore, a slave be pawned, the pawnee must not employ him in service; if a house, he must not dwell in it; and if clothes, he must not wear them;—for the right of the pawnee is in the *possession*, not in the *use*.—Neither is a pawnee authorized to sell the pledge, unless at the desire of the pawner.

The pawnee is not entitled to use the pledge;

or to lend or let it to hire.

A PAWNEE is not permitted to let out, or give the pledge in loan; for as he is himself prohibited from enjoying any use of it, he consequently is not authorized to confer the power of enjoyment upon another. If, therefore, he do so, it establishes a transgression: but a transgression does not occasion a dissolution of the contract.

A PAWNEE may either watch over the pledge himself, or he may devolve the care of its preservation upon his wife, child, or servant, provided they be of his family. If, on the contrary, he commit the care of it, or resign it in trust, to one who is not of his family, he becomes the security, and the person to whom he gave it the secondary security. Concerning this, however, there is a difference of opinion between *Haneefa* and his two disciples; for he does not consider the other person to be a secondary security; whereas they have declared it to be in the option of the pawner to make whomsoever he may please the secondary security.

He may consign it in charge to any of his family.

If a pawnee commit any transgression \* with respect to the pledge, he must make reparation to the whole amount of the value; in the same manner as in a case of usurpation; for the amount in which the value of the pledge exceeds the debt is a trust; and a transgression with respect to a trust, renders the person who commits it liable to make complete reparation.

If he transgresses with respect to it, he is responsible for the whole value.

\* Such as converting it to his own use, &c. (as prohibited above.)

IF

The use of the pledge is determined by the pawner's mode of keeping or wearing it.

IF a person pledge a ring, and the receiver put it on his little finger, and it be afterwards lost or destroyed, he is responsible, as he has transgressed in making use of the pledge instead of using means for its preservation;—and, in this case, the right or left hand is indifferent, there being no uniform custom of wearing a ring invariably upon either.—If, on the contrary, the pawnee wear the ring upon any other than his *little* finger, this is not considered as an enjoyment of use, but as a means of preservation, as it is contrary to the customary mode of wearing a ring.—So likewise, if the pawnee wear a sheet (which he has received in pledge) after the customary mode, he is responsible for it; whereas, if he spread it over his shoulders, he is not responsible.

IF a person pawn two or three swords, and the pawnee fling them over his shoulder, then, provided there be only *two*, he becomes responsible for their value in case of their loss, but not if there be *three*; the reason of which is, that amongst warriors it is a frequent custom to fling *two* swords on their shoulders in battle, but never to fling *three*.

IF a person pawn two rings, and the pawnee put them both on his little finger, and it appear that he was accustomed to adorn himself in this manner, he is liable to make compensation in case they be by any means destroyed; but if the contrary be proved, he is exempt from any responsibility.

The expences of conservation [of the pledge] rest upon the pawnee; and those of subsistence upon the pawner;

THE rent of the house wherein the pledge is kept, as well as the wages of the keeper, rest upon the pawnee:—but if the pledge be a living animal, and require a keeper and maintenance, the expence of these must be defrayed by the pawner.—It is to be observed that the wants of a pledge are of two kinds; I. such as are requisite towards the support of the pledge and the continuance of its existence;—II. such as may be necessary towards its preservation or safety, whether

whether wholly or partly. Now, as the absolute property of the pledge appertains to the pawner, the expences of the first class must therefore be defrayed by him; and as he has, moreover, a property in the *usufruct* of the pledge, its support and the continuance of its existence for this reason also rest upon him, being an expence attendant upon his property;—in the same manner as holds in the case of a *trust*. (Of this class are the maintenance of a pledge in meat and drink, including wages to *shepherds*, and so forth; and the clothing of a slave, the wages of a nurse for the child of a pledge, the watering of a garden, the grafting of fig-trees, the collecting of fruits, &c.) The expences of the *second* class, on the contrary, are incumbent on the pawnee; because it is his part to *detain* the pledge; and as the preservation of it therefore rests upon him, he is consequently to defray the expence of such preservation. (Of the second class is the hire of the keeper of the pledge; and so likewise the rent of the house wherein the pledge is deposited, whether the debt exceed or fall short of the value of the pledge.)—All that is here advanced is according to the *Zâbir Rawdyet*. It is recorded, from *Aboo Yoosaf*, that the rent of the house is defrayed by the pawner, in the same manner as maintenance, it being his duty to use every possible means towards securing the existence of the pledge: but that a *judl*, or reward for restoring a fugitive slave, is of the *second* class; for as the pawnee is necessitated to use every possible expedient to recover the possession of the slave, the reward, as being connected with preservation, must be defrayed by him. This, however, holds only with respect to such pledges as do not exceed the amount of the debt; for where the value of the pledge exceeds the amount of the debt, the pawnee must not be taxed with the payment of the *whole*, but with such share of it only as is proportionate to the value of the pledge; whilst the remaining part, in proportion to the surplus, falls on the pawner; for the excess not being held by the pawnee in *pledge*, but in *trust*, the restitution of the slave, in regard to the excess, is, as it were, made to the absolute owner, to whom, therefore, the surplus must be charged.

but those incurred by sickness or by offences must be defrayed by both.

THE expence of healing the wounds, of curing the disorders, and of pecuniary expiations for the crimes of pledges, are defrayed by the pawnee and pawner proportionably to the amount of the debt, and the excess of the value of the pledge over the debt.

Taxes are defrayed by the pawner.

THE taxes on pledges are levied from the pawner, as they are necessary towards the subsistence of his property.

Tithe (upon pawned land) have preference to the right of the pawnee.

THE tithe from the revenue of tithe-lands held in pawn, precedes the right of the pawnee; because it is connected with both the *substance* and the *property* of the pledge, whereas the right of the pawnee is connected with the *property* of it only, not with the *substance*.—Still, however, the contract of pawn is not invalidated in regard to the sum remaining after the payment of the tithe, as the obligation of tithe in no respect impugns the pawner's right of property. It is otherwise where an undefined part of a pledge proves the right of another; for in that case the contract becomes null with respect to the remainder, because this shews that the pledge was not wholly the pawner's property.

If either party voluntarily defray what is incumbent on the other, he has no claim upon him on that account.

If either party defray any of the expences incumbent on the other, it is deemed a voluntary and gratuitous act. If, on the contrary, one of them should, by order of the *Kâzee*, fulfil a duty incumbent on the other, he has in that case a claim on the other for so doing, in the same manner as if he had done it at his instigation; for the *Kâzee's* jurisdiction is *general*. It is recorded, from *Hane fa*, that no claim can be made on the other, notwithstanding the expence be defrayed by order of the *Kâzee*, unless he were then absent. *Abu Yûsuf*, on the contrary, has said that a claim is valid in both cases; that is, whether the other were present or absent.

## C H A P. II.

Of Things capable of being pawned; and of Things  
for which Pledges may be taken.

IT is unlawful to pawn an indefinite part of any thing. *Shafëi* maintains that it is lawful.—On behalf of our doctors two reasons are urged. *First*, this disagreement arises from the difference of opinions regarding the object of pledges; for according to us, pledges are taken to be detained with a view to obtain payment of a debt, which cannot be effected in case the pledge be an undefined part of property; because a seizure of things of that nature cannot be made, a real seizure being only practicable with respect to things which are defined and distinguished;—whereas, according to *Shafëi*, the object of pledges is that the pawnee may sell them to effect a discharge of his debt; and with this object pledges of the nature above mentioned are not in any shape inconsistent.—*Secondly*, it is an essential part of the contract of pawn, that the pledge be constantly detained in the hands of the pawnee until the redemption of it by the pawner; a condition which cannot be fulfilled with respect to pledges of the above nature; for in such cases it would be necessary that the pawner and the pawnee have possession of the article alternately, whence it would be the same as if the pawner were to say to the pawnee, “I pawn it to you every other day.”—As, therefore, a constant detention is in such case impossible, it follows that the pledge of an undefined part of any thing, whether capable of division or incapable, is illegal.

An indefinite  
part of an  
article cannot  
be pawned,

even to a partner in the article.

It is not lawful to pledge any undefined part of joint property, even to a copartner; for, besides that the detention of such pledges cannot be made, the receiver would in such case retain possession of it, one day in virtue of property, and another in virtue of the contract of pawn; and thus he would hold it one day in pledge, and another not.

If the pledge be rendered indefinite by any supervenient act or circumstance, the contract of pawn is annulled.

A SUPERVENIENT indefiniteness is repugnant to the continuance of a contract of pawn, according to the *Mabsoot*;—in other words, if a person pledge a piece of ground, for instance, and afterwards desire a trustee \* to sell the half thereof, and the trustee accordingly do so, the contract of pawn no longer exists.—It is recorded from *Abou Yoosaf*, on the contrary, that a supervenient indefiniteness does not dissolve a contract of pawn,—in the same manner as it has no effect in the case of donations;—in other words, if a person bestow any thing in gift upon another, and afterwards retract the half, the gift still remains valid with respect to the other half.—The reason for what is quoted from the *Mabsoot*, as above, is that, in the case there stated, the subject of the contract does not exist as before; and a subsequent circumstance, as far as it has a tendency to annihilate the subject of the contract, operates equally as if it had existed from the beginning;—in the same manner as where a person (whether knowingly or unknowingly) marries within the prohibited degree.—It is otherwise with gifts; for the effect of gift is investiture with right of property; and an undefined part of a thing is capable of being *property*. The reason, moreover, why feizin, in the case of a gift, is requisite before the right of property can be acquired, is to prevent the possibility of compulsion; for if the grantee should become proprietor of the gift immediately upon its being offered, and without taking possession, the giver (who ought to act of his own accord) would then be constrained to do

\* Arab, *Adil*. (See note, p. 195.)

that

that to which he has not yet assented; namely, to deliver up the gift.

It is not lawful to pledge fruit without the trees which bear it, crops without the land on which they are produced, or trees without the ground on which they stand; for as the pledge, in all these cases, has a natural connexion with an article which is unpledged, it is therefore, in effect, indefinite, until such time as it be separated from that article.—In the same manner also, it is unlawful either to pawn a piece of ground without the trees which are produced upon it, a field without its produce, or a tree without its fruit; because, in these cases, a mortgage is induced of an article naturally conjoined with another which is not pledged. In short, it is a rule that when a pledge is joined to something not in pawn, the contract is not valid, since in such case possession cannot be taken of it. *Haneefa* has judged it lawful to pawn a piece of ground without its trees; for as the trees have no connexion with the ground, except in that part only from which they vegetate, they may therefore be excepted, together with the particular spot on which they stand. It is otherwise when a person pawns the court-yard of a house without the building itself; for then the part of the ground on which the building stands remains unpledged, whereas it is requisite that the *whole* of the ground be pledged.

An article naturally conjoined to another cannot be pawned separately:

It is lawful to pawn trees, together with the particular spots of ground on which they grow; for here subsists a *vicinity* only with the pawner's property, which is not repugnant to a contract of pawn.—If, in this case, there be fruit upon the trees, it is included in the contract; for as the fruit is an appendage of the tree, because of the connexion between them, it is therefore included in the contract, in order that the same may be valid.—It is otherwise in the case of *sale*, for as trees may be sold without their fruit, unless that be expressly stipulated, it is not included in the sale. It is also otherwise with respect

Trees, however, may be pawned with the immediate spots on which they grow, without including the rest of the land.



respect to valuables deposited in a house; for these not being appendages to the house are not included in the pledge, unless they be expressly stipulated. Grain, however, and herbs are considered as included, in case of their ground being pawned; but not in case of the *sale* of it. Buildings, also, and trees, are included in the contract of pawn, when the ground or villages to which they belong are pledged.—A person may also lawfully pawn a house, together with whatever it contains.

A claim of right established in a separable part of a pledge does not annul the contract with respect to the remainder.

If another person prove his right to part of a pledge, and the remaining part be of such a nature that it might with propriety be distinctly pawned, (as where another proves his right to the *court-yard* only of a pledged house, without the *building*,) the contract still subsists with respect to the remaining part; in other words, if the residue be destroyed in the hands of the pawnee, his debt is divided between such residue and the value of what had proved the right of another; and the proportion which the residue bears to the whole is struck off from the debt, and that which the other part bears to the whole remains due from the pawner\*. If, on the contrary, the residue be of such a nature that it cannot be separately pawned, (as where another proves a right to a pledged house without its court-yard,) the contract of pawn becomes absolutely void; for it cannot operate upon any thing except what remains after deducting what has proved the right of another; and such residue is incapable of being pawned.—It is to be observed that the continuance of the pawner, or of his goods, in the house which he has pledged are obstructive of a regular delivery of the house;—in other words, if a person pledge or mortgage his house, and remain himself, or keep his goods therein, a delivery to the pawnee is not established until he evacuate it, or withdraw his goods therefrom; whence, if it be destroyed in the interim, the pawnee is

Occupancy, so as to obstruct a delivery of the pledge to the pawnee, prevents his becoming responsible for it.

\* The mode of calculation, in this case, will be exhibited in a note in the last section of this book.

not

not answerable.—In the same manner, the continuance of any thing within a pledged vessel is repugnant to the delivery of it; and so likewise the continuance of a burden on a pawned quadruped,—whence the contract is not complete until the burden be taken off, as the animal otherwise continues occupied. It is different where the *burden* is pawned and not the *animal*; for in this case the contract is valid, and the burden is pledged immediately upon the pawner delivering over the animal, it being occupied by the burden, not the burden by it; in the same manner as where things contained in a house or vessel are pledged without that house or vessel.—It is otherwise, however, where a person pawns a saddle or bridle upon a camel, and delivers the camel to the pawnee; for in that case the contract is not valid until the saddle or bridle be taken off the camel and delivered separately to the pawnee; these being dependants of the camel, in the same manner as fruit is a dependant of the tree;—whence it is that (as lawyers have remarked) whenever a camel is pawned with a saddle or bridle on it, these are likewise included in the contract, although not particularly specified.

It is not lawful to take pledges for *trusts*, such as deposits, loans, or *Mozáribat*, or partnership stock;—in other words, if a person commit his goods in trust to another, taking a pledge for the same, it is invalid, as the receipt of the pledge would subject the receiver to responsibility; for if the pledge were destroyed in his hands, his claim would be extinguished in a degree proportionate to the value.—In short, it is requisite that something lie against the pawner of a nature to subject him to responsibility, in order that, opposed to it, the possession of the pledge, in the event of its destruction, may subject the pawnee to responsibility, and operate as a discharge of his claim; but there is no responsibility with respect to *trusts*.

Pledges cannot be taken for *trusts*.

It is not valid to take a pledge for articles which do not subject the holder to responsibility,—such, for instance, as an article sold, and

nor for any thing not insured with

the holder  
of it;

and which still remains in the hands of the seller; for if the purchaser be desirous of taking a pledge from the seller to answer the delivery, it is invalid, an article sold not being insured in the hands of the *seller*. (Still, however, if the article sold perish in the seller's hands, his claim on the buyer for the price ceases; or, if he should have previously received the price from the buyer, he must restore it.)—With respect, on the contrary, to articles which subject the holder to responsibility, (that is, those for which, when destroyed, the holder is responsible,—for a *similar*, if of the class of similars;—or for the *value*, if of a different description,—such as *usurped* property, the consideration for *Khoola*, the dower to a wife, and the composition for wilful murder,) it is lawful to take pledges for them, as responsibility attaches to all such matters, since if the article be extant the delivery of it is incumbent, or the value if it be destroyed. Opposing a pledge to such articles, therefore, is taking a pawn in security for that which is itself a subject of responsibility, and is consequently valid.

nor as a security  
against  
contingencies.

It is not lawful to take a pledge as a security against contingencies;—in other words, if a person sell an article and receive the price, and the purchaser, from an apprehension that the property might afterwards prove the right of another, and that he might thereby be rendered liable to a loss, should on that account demand a pledge from the merchant securing him against such a circumstance, it is invalid; for it is an established maxim that a pledge is to be taken as a security for the discharge of a claim *then extant*; and in the above case the claim does not exist, but is only what may possibly happen. If, therefore, a pledge be in such a case taken, it is considered as taken in *trust*, and not in *pawn*, and is in no respect subject to the laws of pledges. In a similar manner, if a person deposit any thing in pledge with another, in security for any thing which may *in future* be due from him, it is invalid.—It is, indeed, otherwise in the case of a *promised* debt;—as where a person gives a pledge to another on the strength of his promising to lend him one thousand *dirms*, and the other takes the  
pledge

pledge and promises to lend the money, and the pledge perishes in his hands; for in this case he is responsible in proportion to the sum promised, in the same manner as if it had been actually paid, the promise of debt being considered as an actual existence of it, for this reason, that it was made at the earnest desire of the borrower.

If a person, having bespoke goods of a merchant, pawn something in security for the payment of the purchase-money, or having sold silver to a banker, receive a pledge in security for the price, or if a merchant give a pledge to a person who has bespoke goods from him, as a security for his delivery of them,—the contract is valid. *Ziffer* has said that the contract, in these instances, is not valid, inasmuch as the object of the pawn in such cases is that it may be a security for the discharge of the several claims, namely, the purchase-money of the goods bespoke, the value of the silver sold to the banker, or the goods bespoke,—which is not allowable, because an exchange is here induced of things not delivered for things of a different species; and an exchange of such things, previous to seizure being obtained of them, is unlawful. The argument of our doctors is, that as a parity of species betwixt the things which were to be delivered, and the pledge, holds good with respect to their *worth*, by means of their worth the engagement may be fulfilled;—and the possession of a pledge induces a responsibility in regard to its worth, although with respect to its substance it be considered merely as a *trust*.—If, also, the pledge opposed to the price of the article bespoke, or the value of the silver sold, be destroyed at the time of making the contract, (that is, before the company in whose presence it was made breaks up,) the bargain is accomplished, and the pawnee or seller is reckoned to have received his right; because by the destruction of the pawn he is virtually considered to have received the price of his silver, or the amount of money which was to have been advanced.—If, on the contrary, the buyer and seller should have separated previous to the destruction of the pledge, the bargain becomes invalid; because the receipt of the

Cafe of  
pawns in bar-  
gains of Sil-  
ver or Sirf.

price of the silver, or the advance of money for the goods at the time of making the bargain, (which is a condition,) is not here established either in reality or in the construction of law.—If, moreover, a pledge taken in security for the delivery of the goods bespoken be destroyed, the bargain is completed, and the pawnee (who advanced the money) is held to have received the goods which he bespoke.

In the dissolution of a contract of *Sillim*, the pledge remains as a security for the advanced capital;

If the parties to a contract of *Sillim* dissolve the bargain in a case where a pledge has been given for the delivery of the goods, it still remains as a security for the refunding of the money which had been advanced; as *that* then stands in lieu of the goods;—in the same manner as where goods are usurped, and, the *Kázee* having ordered their restoration, a pledge is given for that purpose, and afterwards the goods are destroyed,—in which case the pledge remains a security for the *value* of the goods.

and if it be lost in the advancer's hands, his claim of restitution is annulled.

If, in the above instance, the pledge be lost after the parties had agreed to annul the bargain of *Sillim*, the bespoken article is in that case considered as *delivered*, and the purchaser [the advancer] has no further claim.—It is, however, incumbent on him to give to the seller as much grain as he should have received from him, in order to his recovering the money he had advanced,—in the same manner as where a person, having sold a slave and delivered him to the purchaser, takes a pledge in surety for the price,—and they afterwards mutually consent to annul the bargain,—in which case the seller is entitled to retain possession of the pledge as a security for the restoration of the slave; and if the pledge be destroyed in his hands, he is considered to have received the purchase-money; and it is incumbent on him to pay the sum of the purchase-money to the buyer, and thereby recover his slave.

It

It is not lawful to pawn either a freedman, a *Modabbir*, a *Mokâtib*, or an *Am-Walid*; because the end of a contract of pawn is to establish the pawnee's possession of the pledge, with a view to obtaining payment of his claim; a view which cannot be accomplished in any of the above-mentioned instances, as a freedman is not property, and the sale of the others is contrary to law.

A freedman, a *Modabbir*, a *Mokâtib*, or an *Am-Walid*, cannot be pawned.

If a person agree to be bail for the appearance of another, it is not allowable to demand a pledge from him on this account.—In the same manner also, it is not lawful to take a pledge as a security for a criminal condemned to suffer retaliation either in life or limb, as in such case the right could not be obtained by means of the pledge. It is otherwise in the case of offences by *misadventure*; for there the fine may be discharged by means of the pledge.

Pledges cannot be taken to secure the appearance of a *surety*; or of a criminal liable to retaliation;

It is not lawful to take a pledge opposed to a right of *Shaffa*:—in other words, if a person appeal to the *Kâzee*, (for instance,) and claim his privilege of *Shaffa*, and obtain from him a decree to that effect, and demand of the purchaser a pledge for the house over which his privilege of *Shaffa* extends, the pawn is not valid; for here the article is not insured in the hands of the purchaser; (that is to say, if the house suffer any damage in the possession of the purchaser, he is not responsible for it;) and a pledge cannot be taken but for matters that induce responsibility.

or in security for a right of *Shaffa*;

It is not permitted to take a pledge opposed either to a slave guilty of a crime, or to the debt of a slave; because the master is not in either instance responsible, since, in case of the death of the slave, he is not obliged to discharge his debts.

or for a criminal slave, or the debt of a slave;

or for the wages of a public *finger* or *monstrous*.

It is not lawful to give a pledge for the wages either of a mourner\* or of a finger. If, therefore, a pawn be given in such case, and be afterwards destroyed in the hands of the pawnee, he is not responsible for it, as the thing in security for which it was pledged is not a subject of responsibility.

A *Mussulman* cannot give or take wine in pawn: but if he so receive wine from a *Zimnee*, and it be destroyed, he is responsible.

It is unlawful for a *Mussulman* either to give or take wine in pawn, whether from a *Mussulman* or a *Zimnee*. Notwithstanding this, however, if the *Zimnee* be the pawner and the *Mussulman* the pawnee, and the wine be lost or spoiled, the *Mussulman* is accountable for it, in the same manner as in the case of his having *usurped* it: whereas, if the *Mussulman* were the pawner and the *Zimnee* the pawnee, and the wine be lost in the hands of the latter, he would not owe any compensation to the *Mussulman*, any more than a person who had *usurped* wine from a *Mussulman*. It is otherwise where the pawner and pawnee are both *Zimnees*; for wine is property with them. Carrion, on the contrary, is not property with them any more than with *Mussulmans*; and accordingly a pawn of carrion is not valid among them any more than with us.

A pawnee is still responsible for the pledge, although it appear that the debt to which it was opposed is not due.

If a person purchase vinegar, a slave, or a slaughtered goat, and, having given a pledge for the purchase-money, afterwards discover the vinegar to be wine, the slave to be a freeman, or the goat to be carrion†, still the seller is responsible for the pawn in case of its being lost or destroyed; for it was deposited in opposition to a debt to all appearance due. The same rule also holds in a case where a person, having killed a [supposed] slave and given a pledge for the payment of his value, after-

\* Meaning, a person employed, on occasions of grief, in making lamentations.—It is a custom amongst the *Mussulmans* to employ such persons, although prohibited by the law;—whence it is that they cannot legally sue for their hire.

† As having died a natural death.—The term *carrion* is applied to the flesh of all animals not slain according to the prescribed form.

wards discovers that he was a freeman. So, likewise, where the parties in a suit compromise the business for a part of the plaintiff's demand, and the defendant deposits a pledge to answer the same, and they afterwards agree that nothing was owing from the defendant, the pledge is insured in the hands of the holder of it.

It is lawful for a father to pledge, in security of his own debt, the slave of his infant child; for a father has the privilege of depositing the goods of his infant child in trust; and to pledge them is still more conducive to the interest of the proprietor than to place them in trust, since if a pledge be lost it must be accounted for, whereas a trustee is not responsible for the deposit in his hands. A guardian also is the same as a father in this particular, because such an authority vested in him is beneficial to the child. *Abou Yoosaf* and *Ziffer* maintain that this is not lawful either to the father or guardian; (and such is what analogy would suggest;) for a pledge is, in effect, equivalent to a *payment*; and as a father is not privileged to pay off his debts with the goods of his child, it follows that he has no power of giving them in pledge.—To this, however, it may be replied, that there is an obvious difference between the act of *pledging* and that of *payment*; for discharging the debts by means of the child's property is a destruction of his right without any equivalent; whereas, placing his property in pledge is providing it a guardian, for the interim, without in any degree affecting his right. As, therefore, the contract of pawn is valid in this instance, it follows that in case of the pledge being destroyed in the pawnee's hands, he is considered to have received payment of his debt, and that the father or guardian are responsible to the infant, as having discharged their debt by means of his property.—In like manner it is lawful for a father or guardian to order the pawnee to sell the pledge; for both of these have the privilege of selling the goods of their infant ward. The learned have said, that this is founded on the law in a case of *sale*; for where a father or guardian gives the goods of his ward to his own creditors, in payment of his debt, it is lawful; and

A father or guardian may pledge the slave of his infant ward for a debt owing by himself;

(but they are accountable in case of loss;)

and they may also authorize the pawnee to sell the slave.



and a commutation being thus made of the debt for the price, the father or guardian, in the opinion of *Haneefa* and *Mohammed*, become answerable to the ward for the value.—According to *Abou Yoofof*, on the contrary, a commutation does not take place;—and the same difference of opinion obtains where an agent for sale disposes of the goods of his constituent to a person to whom he is indebted. The contract of pawn, however, is in these instances similar to that of sale with respect to its effects; for in both the object is to discharge the debts of the father or guardian with the goods of the infant, and to become answerable for them.

A father may retain the goods of his infant child in pledge for a debt owing from the infant to himself, or to another infant child, or to his own mercantile slave :

If a father pawn the goods of his infant child into his own hands for a debt due from the child, or into the hands of another of his children being an infant, or of his slave, being a merchant and not in debt, it is lawful; because a father, on account of the tender affection which he is naturally supposed to have for his child, is considered in a double capacity, and his bare inclination as equivalent to the assent of both parties; in the same manner as where a father sells the property of his infant child to himself.

but a guardian has not this privilege ;

It is not lawful for a guardian to pledge into his own hands goods belonging to his ward on account of a debt due to him, or into the hands of his child being an infant, or into the hands of his slave being a merchant and free from debt; (nor is it permitted to him to give any thing of his own in pawn into the hands of an orphan for a debt owing to the orphan from himself;) for a guardian, being merely an agent, cannot of course have a double capacity in contracts. A guardian, moreover, is more deficient in tenderness than a father, and therefore cannot, like a father, stand in a double capacity in making contracts. Besides, a guardian pawning the property of his ward into the hands of his infant child, or his slave, being a merchant and free from debt, is in effect the same as pawning it to *himself*.—It is otherwise where a guardian pawns the property of his ward to his *adult* son,

to

to his father, or to his indebted slave, since over these he has no authority.)

If a guardian purchase victuals or apparel for the use of his ward, and, having debited him for the price, take in pawn part of his goods as a security for the debt, it is valid ; for, as he is permitted to borrow for the use of the orphan, and as taking a pawn is like the discharge of a claim, it is of consequence legal. Besides, as it is lawful for a guardian to trade on account of his ward, it follows that it is also lawful for him to give and receive pawns, they being similar to receipts and payments.

yet he also may retain the goods in pawn for necessities furnished by him.

If a father pawn the goods of his infant son, and the infant attain maturity, still he is not at liberty to annul the contract of pawn and take back the pledge until he shall have discharged the debt ; for the contract is binding upon him ; as the act of a father on behalf of his infant child is binding upon the child after he shall have attained maturity, a father being his infant child's substitute.

A child cannot recover property which had been pawned by his deceased father, but by redeeming it.

If a father pawn the goods of his son on account of his own debt, and the son, by a discharge of the debt, redeem the same, he has a claim on the father for the sum ; for it was necessary that the son should discharge the debt, having occasion to release his goods out of the hands of the pawnee ;—in the same manner as holds with respect to the lender of a pledge ; in other words, if a person lend any thing to another with a view to that other's pawning it, it is lawful to him to redeem the article from the pawnee by a discharge of the borrower's debt, and then to prefer a claim of debt against the borrower ; and so here likewise.—If, also, in this case, the pawn be lost or destroyed before the son's release of it by discharging his father's debt, it is lawful for him to prefer a claim upon the father, as he has in effect discharged his debt by means of his [the son's] property.

If he redeem it during the father's lifetime, he has a claim on him for what he pays ;

and the father is responsible in case of the pledge being lost.

It is lawful for a father to pawn the goods of his son for a debt jointly due by both. If, therefore, the pledge be destroyed, the father must compensate to the son by the payment of a sum equivalent to his [the father's] share of the debt; because he has paid off so much by means of the son's property.—The same rule also holds with a grandfather, or a guardian, in case of the non-existence of the father.

Case of a guardian pawning the goods of his orphan ward, and then borrowing and losing the pledge.

If a guardian purchase victuals for an orphan, so as that the price is a debt upon the orphan, and pawn an article belonging to the orphan as a security for the debt, and the pawnee take possession of the same, and the guardian then borrow it from the pawnee for the use of the orphan, and it be destroyed in his [the guardian's] hands, it is no longer included in the contract of pawn, nor is any person responsible for it; for the act of the guardian in this instance is the same as that of the orphan when he has attained maturity, he having borrowed the article for his use,—in which case such is the rule. The debt of the orphan, in this case, still remains due; and the creditor is to receive payment from the guardian, who is reimbursed by the orphan; because the guardian, in borrowing the pledge, was not guilty of any transgression, as it was borrowed for the orphan's use. If, on the contrary, it have been borrowed on his own account, he is responsible for it to the orphan; because in borrowing it for his own use he is guilty of a transgression, as having usurped a privilege which does not belong to him. If, also, he were to usurp it from the pawnee and apply it to his own use, he is responsible for the value, as having been guilty of a transgression,—with respect to the pawnee, by the usurpation,—and with respect to the orphan, in having applied the article to his own use. He is, moreover, in this instance bound to discharge the debt of the pawnee, if the term stipulated should have expired. If, therefore, the value of the pawn be equivalent to the debt, he must discharge it in full, without any reimbursement from the property of the orphan; for the same that was before due from the orphan to him becomes now so from him to the orphan, and hence a commutation

commutation takes place. If, on the other hand, the value of the pledge be *short* of the debt, he must discharge from his own property a sum equivalent to the pledge, and the residue from that of the orphan; for he is only liable for the amount of the value of the pledge. If, on the contrary, the value of the pledge *exceed* the debt, he must pay the amount of the debt to the pawnee in discharge of his claim, and the remainder is the right of the orphan. If the stipulated term of payment should not have expired, the value of the pledge must be deposited in pawn with the pawnee; for the guardian having destroyed one of the established rights of the pawnee, the value of it therefore must be given in pledge into his hands;—and upon the term of payment arriving, the same rules are to be observed as are above fully set forth.—It is to be observed, however, that the guardian, in case of having extorted the pawn and applied it to the use of the orphan, becomes (if under these circumstances it should be destroyed) liable only to make reparation for violating the rights of the pawnee, as in applying it to the use of the orphan he does not violate his right; neither is his taking it from the pawnee any transgression with respect to the orphan, as a guardian is authorized to take the goods of his ward;—whence it is that *Mohammed*, in the *Zeeadât*, (under the head of *Acknowledgments*,) has said, “Where a father or guardian acknowledges “having usurped the goods of his infant ward, nothing is chargeable “to them in case of loss or decay; because this is not an usurpation, “they having an unlimited power to take the goods of their ward.” In the above case, therefore, the guardian is answerable to the pawnee; and at the expiration of the stipulated term he must discharge his debt and charge it to the account of the orphan; for he has in no respect prejudiced him, but has on the contrary applied the pawn to his use. If, however, the term of payment be not arrived, the thing given in reparation must, until then, remain as a pledge in the hands of the pawnee, when he is to obtain payment of his debt, and the guardian to recover the amount from the orphan’s property.

Money, and all weighable and measurable articles may be pawned, —Rules to be observed in those instances.

It is lawful to pawn *dirms*, *denars*, or any article of weight or measurement of capacity; for as a debt may be discharged by means of such articles, they are consequently fit to be pawned. If, therefore, any such articles be pawned in security for an article of the same kind or species, and be lost in the pawnee's hands, the debt becomes cleared in a degree proportionate to the value of the pledge, if that be either equal to, or less than the amount of the debt. If, on the contrary, the value of the pledge exceed the amount of the debt, the whole of the debt is in that case held to be discharged, notwithstanding the one be base and the other pure; for where the pawn and debt are of the same kind, the quality is not to be considered. This is the opinion of *Haneefa*; for (according to him) the pawnee in the above case is to receive payment of his debt by weight, and not by value.—The two disciples, on the contrary, hold that the pawnee, on the loss of the pledge, becomes responsible for its value in some thing of a different species, which value he holds (as it were) in pawn in lieu of the original pledge\*. The argument of *Haneefa* is, that any regard to quality drops in the case of usurious property† when opposed to its own species.—A discharge in a pure article of this nature, moreover, in return for a base article, is lawful,—as where, for instance, a debtor, through inattention, repays a debt of base money in pure money.

Case of a silver vessel pawned,—and afterwards lost,

If a silver vessel equiponderant to ten *dirms* be pawned for a debt of ten *dirms*, and afterwards lost in the hands of the pawnee, the whole amount of the debt stands discharged. The compiler of the *Hedaya* remarks that this rule universally obtains with our doctors where the

\* Here follows a case in point, quoted from the *Jama Sagher*, with the author's remarks, and the difference of opinion among the *Musfulman* doctors concerning it; which is omitted by the translator, as it interrupts the discussion of the point in question, and the arguments adduced have been before fully detailed under the head of *Usury*.

† Arab. *Inwâl Rabwæ*; meaning any sort of grain,—and also gold or silver;—in short, every thing with respect to which usury can be conceived possible.

value

*value* of the vessel is either equal to, or greater than the *weight* of it: but that where the *value*, by being short of the *weight*, is short of the debt, there is a difference of opinion; for, according to *Haneefa*, the *whole debt*, in that case, stands discharged, (he holding that the pawnee to have received payment by the *weight* of the vessel;)-- whereas the two disciples teach that the pawnee remains responsible for the value, which continues with him (as it were) in pawn, his claim still existing as before. If, on the contrary, the vessel be not *lost*, but *broken*, then, on the first supposition, (that is, supposing the weight and value to be the same,) according to *Haneefa* and *Aboo Yoofoof* the pawner is not compellable to redeem it; for if he were to redeem it by paying the greatest part of his debt, and deducting some small part of it in consideration of the loss arising from the breakage, it would in that case appear that he consider the quality separately, and on this account paid only *part* of his debt, which is illegal; or if, on the other hand, he were to redeem it by paying the *whole* of his debt, and thus taking the broken vessel, it would be a loss to him. The pawner, therefore, (according to the two *Elders*,) is at his own option, either to redeem the broken vessel by paying the *whole* of his debt, or to relinquish it and compound with the pawnee for its value, which may either be of the same or of a different species from the vessel; and this value remaining (as it were) in pawn, the pawnee becomes proprietor of the vessel, because of his having thus made compensation for it. In the opinion of *Mohammed*, on the contrary, the pawner may either redeem the broken vessel by a payment of the whole of the debt, or he may give it to the pawnee as a discharge of it, in the same manner as in the case of the *loss* of the pawn. Hence *Mohammed* conceives an analogy between a pawn *damaged* and a pawn *lost*, for this reason, that when a redemption cannot be made without a compensation, it is then the same as if the pawn were lost; and as, when the pawn is actually lost, the debt becomes (in the opinion of all our doctors) annulled, it is so likewise in the present instance, which is a case of loss *in effect*.—*Haneefa* and *Aboo Yoofoof* have said,

that when a pawn is lost the pawnee is held to be paid in respect of the *worth*,—in this manner, that he becomes immediately answerable for the value of the pawn to compensate for its loss, and that a commutation for the debt takes place.—But when a debt is annulled for a pawn then extant, though somewhat damaged, an absolute appropriation of it takes place; that is to say, it must be so detained as to render the substance of it the property of the pawnee. This is, however, a mistaken determination, and is rejected in law; wherefore it is most proper that a substitute be made of the *value* \*.

A pledge may be stipulated, in sale, for the price of the article sold:

If a person sell a slave on condition that the purchaser shall deliver to him in pawn some specified thing, it is lawful on a favourable construction; whereas analogy would suggest that it is unlawful. So also, it is lawful for a person to sell a slave, on condition that the purchaser give, as his security, a third person who is present at the conclusion of the bargain, and who consents to be security. The objection suggested by analogy, in this instance, is that the agreement entered into forms a double compact, or one compact within another, which is prohibited in the LAW.—Besides, it contains a condition which is not conformable to the object of the agreement, and from which there results an advantage to the seller, who is a party in both the compacts; and such a condition renders a contract of sale void. The reason, however, for a more favourable construction of the law, in this particular, is that such a condition in the agreement is no way repugnant to the contract, since bail or pawn tend to ensure and strengthen the agreement, and are in strict conformity with the obligation of the price. If, therefore, the proposed surety be present at the conclusion of the agreement, or the pledge be specified, attention is paid to the condition of bail or pawn; for, as being proper to the agreement,

\* A long discussion which follows upon this subject is omitted by the translator, as containing merely a train of subtle and frivolous distinctions relative to *usury*, of no practical utility.

they

they are consequently legal. If, on the other hand, the surety be not present, nor the pledge specified, the agreement is invalid; for the intention of giving bail or pawn do not in that case exist, inasmuch as the pledge or surety are unknown; and as there remains only a nugatory condition, the agreement is therefore invalid. Still, however, if the proposed surety appear before the parties have separated, and acquiesce in the bail, the agreement then becomes valid.—If the purchaser, after the pawn had been agreed upon, should refuse to deliver the pledge specified, the *Kāzee* must not compel him thereunto, as it is the delivery alone that determines the agreement.—*Ziffer* has said, that when the condition of pawn is included in the sale, a fulfilment of it is absolutely necessary; and that therefore the *Kāzee* may enforce it; for the condition having been stipulated as an article of the sale, becomes one of the rights thereof, and is equally binding, although it be not in itself of any force;—in the same manner as a power of agency included in a contract of pawn, which is binding because of the contract being so; in other words, if the pawner of a thing were to stipulate that the pawnee shall undertake the sale of it, such agency would be binding;—whence it would not afterwards be in the power of the pawner to retract it. In reply to this, however, it is to be observed, that the agreement of pawn is *voluntary* on the part of the pawner; and there is no compulsion to the execution of a voluntary deed. The seller, however, may, at his discretion, either relinquish the agreement of pawn, or he may invalidate the sale; for as he had earnestly desired the detention of the pawn, and as it was on the strength of that condition only that he had agreed to the sale, he is not, consequently, in default of it, obliged to adhere to his agreement, unless the buyer should in the mean time either have paid the price, or pawned, in place of the thing specified, the worth of it in *dirms* or *deenars*, in which case the sale becomes complete and binding, since, in the first instance, the seller obtains his object, and in the second he obtains the fulfilment of a condition with which he was satisfied, the pawn of the *value* being the same as that of the *substance*, for the end

but the agreement is not valid unless the pledge be particularly specified;

nor can the purchaser be compelled to deliver it.



of the agreement is *to obtain payment*, and that can only be obtained by means of the product of the pledge, namely, the *value*.

An article tendered by a purchaser in security for the price of the merchandise is considered as a pledge, although the term *pawn* be not expressly mentioned by him.

If a person purchase any thing for a particular sum, and request of the feller "to keep his robe until such time as he pays him the "purchase-money," the robe is considered as a pledge; for the buyer, in saying that the feller should detain the robe until he render him the purchase-money, spoke in a manner which implied an intention of pawn, although he did not expressly mention the word *pawn*: and in every agreement regard is to be had to the *spirit*, not to the *letter*. *Ziffer* maintains that, in this case, the robe is not pawned; in which opinion *Abou Yoozuf* likewise concurs; and the reason they allege is, that the expression used by the buyer does not only imply an intention to *pawn*, but may likewise signify a *deposit*, which construction, as being the most favourable, ought to be adopted.—It is otherwise where a person expresses himself, "keep this robe in security of your debt (or goods,)" for then, in mentioning *security*, it becomes obvious that his object was to *pawn* it.—In answer to this, however, it is to be observed, that in either case his intention was to *pawn* the robe; for although the expression, "keep this robe," may admit of the interpretation either of *pawn* or *deposit*, yet when the speaker subjoins, "until such time as I pay you the purchase-money," it is no longer doubtful that he means to *pawn*, and not to *deposit* it.

SECTION.

## SECTION.

If a person pawn two slaves for a debt of one thousand *dirms*, and afterwards pay the proportion of *one* of these slaves, still he is not permitted to take back that slave until such time as he render to the pawnee the residue of the debt. (By the *proportion* of the slaves is to be understood the particular sum for which each is pawned, when they are both opposed to the amount of the debt.) The argument in support of this determination is, that as a pawn is detained in behalf of the whole debt, it is therefore detained in behalf of every part of it, in order the more strongly to bind the pawner to the payment of his debt; in the same manner as holds with respect to an article sold, where, if the seller, having paid part of the purchase-money, be desirous of taking in lieu thereof a proportionate part of the article, it is not allowed: on the contrary, he must wait until the payment of the whole price be made, when he may take the whole of the goods purchased. The same rule also holds, according to the *Mahsoot*, when the depositor previously specifies the particular value of each of the component parts of his pledge; as, for instance, when a person, having pledged two slaves against a debt of one thousand *dirms*, declares the value of each to be five hundred *dirms*. It is related in the *Zecadat*, on the contrary, that in this case the pawner is permitted to take back the slave upon paying to the pawnee the sum which he had before specified to be his value. The argument of the *Mahsoot* is that, in the case in question, there is only one agreement; and that no separation takes place in it on account of the distinct specification;—in the same manner as in *sale*; in other words, if a person sell two slaves for one thousand *dirms*, and particularly mention the price of each to

Where two (or more) articles are opposed in pledge to one debt, they cannot be redeemed separately.

notwithstanding each article be opposed to a particular part of the debt.

be five hundred *dirms*, still there are not two distinct bargains; and so likewise in the present instance. The argument of the *Zeeaddat* is that in the above case there subsists two agreements; and that it is unnecessary to consider them as one; for, if they be considered as two, it amounts merely to this, that it would follow that the one is a condition of the other, a conclusion which does not invalidate the agreement, but rather the condition itself is invalid,—(whence it is that if the pawnee acquiesce in the agreement respecting only *one* of the two slaves, it is lawful.) It is otherwise in the case of *sale*; for if there be *two* contracts of sale, it leads to this, that the one is a condition of the other; a conclusion which would invalidate the sale altogether.

An article pawned to two persons (in security of a debt jointly owing to both) is pledged *in toto* to each;

IF a person pawn any specific article into the hands of two people, in security of a debt which he jointly owes to both, it is lawful;—and in this case the article is held to be completely pledged into the hands of each of the creditors; because the spirit of the agreement is, that the article is held entire and in one pledge:—nor does it hence follow that the pledge is *undefined*, because of the separateness of rights; for each has a claim to the whole,—the object of the agreement being *a detention in security of debt*; and as that is a thing incapable of severalty, the pawn is therefore detained wholly in security of the debt of each. It is otherwise where a person bestows any thing in gift to two people; for this is not lawful, according to *Haneefa*, as the object of a gift is *an endowment with right of property*, and two men cannot lawfully have each the complete property of one thing, since this would induce the consequence of a moiety being appropriated to each indefinitely, which in gifts is not admissible.—If, in this case, the parties agree to a *Mahàyat*, or alternate possession of the pledge, each is, during his term of possession, a trustee on behalf of the other;—and if it be destroyed, each is responsible according to his respective share,—for upon this happening each is held to have received a discharge

and if they agree to hold it alternately, each is in his turn *trustee* on behalf of the other.

a discharge of his claim, a discharge being capable of partition. If, also, the pawner pay off the debt of either, the article in that case remains wholly in pledge with the other, since it was before completely so in the hands of each without any separation. Analogous to this is the detention of things which have been sold to two or more jointly; for one of the buyers, after paying his proportion of the price, is not entitled to take from the merchant his share of the goods purchased: on the contrary, the merchant may detain the whole until such time as he shall have received the remaining part of the price from the other purchaser.

If two people, by one agreement, pawn a certain thing into the hands of one person in security of a debt which they jointly owe to him, it is lawful, and the thing so pledged is detained in security of the whole of the debt. The pawnee is, moreover, at liberty to detain the pledge until he receive a complete discharge; for the two having pawned the article *together*, the pawnee is therefore held to have received a complete and undivided seizin of it.

If two persons prefer a claim to a slave in the possession of a third, each separately asserting "that the possessor had formerly completely pawned the slave into his hands, and had afterwards borrowed or usurped him," and each produce an evidence in support of his declaration, the claims and evidences are null and inadmissible; for each of the claimants having maintained and supported by evidence that the possessor had pawned the slave completely into his hands alone, it is not, therefore, in the power of the *Kâdee* to decree him to either, as it is impossible that the same slave should be pawned wholly into the hands of one person, and at the same time wholly into the hands of another:—neither could he decree wholly the *substance* of the pawn to any one of them; since he has no reason to prefer one to the other; nor could he decree each of them an half, as a pawn is indivisible. As,

cm.  
If two persons, respectively, claim an article from a third, in virtue of an alleged pawn, and both produce evidence, the claim of both is null.

therefore, it is impossible to decide according to the evidences of either, they are both set aside.

OBJECTION.—It would appear that the *Kāzee* ought to decree the slave to be the pledge of both, since they have both, as it were, received him at the same time, the period when he was pledged not being ascertained.

REPLY.—The *Kāzee* has no power to pass a decree of that nature, as he would thereby depart from the evidence adduced by the parties, each having expressly declared, that the slave was wholly pawned into his hands towards obtaining a satisfaction for the whole of his particular claim. If, on the other hand, he were to decree an *half* to each, he would act in opposition to the evidence, which a *Kāzee* is not at liberty to do.

If a pawner die, leaving an article in pledge with two pawnees, it is sold for the discharge of their claims.

If a pawner die, leaving a pledged slave (for instance) in the hands of two pawnees, and each of them produce evidence to prove that the slave had been pledged wholly to *him*, a moiety of the slave is in that case awarded in pledge to each, and may respectively be sold by them in satisfaction of their claims, upon a favourable construction; and such is the opinion of *Haneefa* and *Mohammed*.—Analogy would suggest that the pawn is in this instance null; (and such is the opinion of *Abq̄ Keesaf*;) for as the intendment of a contract of pawn is that the pledge shall be detained towards obtaining payment of a claim, it follows that the decree of the *Kāzee*, awarding a moiety of the slave to each, proves the pawn to have been indefinitely held in severalty, which is unlawful now, in the same manner as in the lifetime of the pawner.—The reason, however, for a more favourable construction of the law in this particular is, that the object is not the mere *contract itself*, but its *utility*. Now the utility of the agreement in the lifetime of the pawner consists in a detention of the pledge, which cannot be accomplished in the case of an indefinite severalty of claim; but the utility of it after his death is, that the pawnee may sell it in order to discharge

discharge his debt, which a severalty of claims does not prevent,—the case being the same as where two men contend that they are married to the same woman,—or where two sisters contend that they are married to the same man, and evidences are produced to prove it by both;—for in this case the evidence adduced is disregarded during the lifetime of the man; but after his death a decree is passed assigning them their respective shares of inheritance, as that is capable of division.

## C H A P. III.

## Of Pledges placed in the Hands of a Trustee\*.

If the pawner and pawnee agree to place the pledge in the hands of any upright person, (to act as trustee for both,) it is lawful. *Malik* is of opinion that this is not lawful; because the seizure of the trustee is the same as that of the pawner; (whence it is that the trustee has recourse to him for indemnification where the pawn is lost in his possession, and another, having proved a right to it, takes a compensation from him for its loss;) and such being the case, no account is made of the seizure of the pawnee; wherefore the contract of pawn is incomplete, because of the failure of one of its conditions, namely, the seizure of the *pawnee*. The argument of our doctors is that the seizure of the trustee is apparently the same as that of the *pawner*, with re-

The parties may, by agreement, entrust the pledge to the custody of any upright person;

\* Arab. *Adil*, an upright person. (See note in p. 195.)

spect to *preservation*, (the *substance* of the pawn being a *trust*,) and with respect to *worth* it is the same as that of the pawnee, as it subjects him to responsibility in case of its loss, a pawn being insured with regard to its worth; wherefore the trustee stands in the place of two parties, the pawner and the pawnee, to strengthen the object of both, namely, the contract of pawn. (With respect to the trustee's right of having recourse to the pawner, in case of the *loss*, and so forth, as mentioned above, it is admitted solely in consideration of his being the pawner's deputy for the conservation of the substance of the pledge, in the manner of any ordinary trustee.)

after which  
neither of  
them is at  
liberty to take  
it out of the  
trustee's  
hands:

THE pawnee is not at liberty to take the pledge from the trustee, inasmuch as the right of the pawner is still connected with it, in this way, that the pledge is a deposit in the trustee's hands. Neither is the pawner at liberty to take it, because of the pawnee's right being connected with it for the purpose of obtaining payment of his debt. Neither party, therefore, is at liberty to invalidate the right of the other.

but the  
pawnee is re-  
sponsible in  
case of loss,

unless the  
trustee have  
transgressed,  
in which case  
he is respon-  
sible.

If the pledge be destroyed in the possession of the trustee, the pawnee is responsible; for the seizure of the trustee is the same as that of the pawnee in regard to the worth of the pledge; and responsibility attaches only on account of worth. If, on the contrary, the trustee deliver the pawn either to the pawner or pawnee, he is responsible; for this reason, that he is the *pawner's* trustee with respect to the *substance* of the pledge, and the *pawnee's* trustee with respect to its *worth*; and each of these parties stands as a *stranger* towards the other; and a trustee is rendered responsible by delivering the object of his trust into the hands of a stranger. The trustee, therefore, being in this case responsible, cannot retain the value by way of the pawn in his own possession; for as he has become indebted for the value, it follows that, if he were to retain it by way of the pawn, he becomes at once the claimant and claimee; and the payer and receiver; in  
which

which is implied an obvious inconsistency. The pawner and pawnee must therefore, in this case, concur to take the value from the trustee, and deliver it again to him, or to any other person, in place of the original pawn. If, however, they should not concur in so doing, either of them may in that case refer the matter to the *Kāzee*, who may take the value from the trustee, and again deliver it to him, or to any other, in the place of the original pawn. If the *Kāzee* do so, and the pawner afterwards discharge his debt, then, supposing that the responsibility for the value had attached to the trustee in consequence of his having restored the pledge to the *pawner*, the value in question remains secure to the trustee, as the pawner here appears to have recovered his pledge, and the pawnee his debt. If, on the contrary, the responsibility had attached to the trustee in consequence of his having surrendered the pledge to the pawnee, the pawner, upon discharging the debt, is entitled to take from him the value in question; for as, in case of the existence of the pawn, he would immediately on payment of the debt resume it, he is by consequence at liberty to take the substitute. It is to be observed, in this case, that if the trustee have given the pledge to the pawnee in *loan* or *trust*, and it have been destroyed without any transgression on his part, he [the trustee] is not entitled to take the value from him [the pawnee;]—whereas, if the pawnee have occasioned the loss, he is so entitled; for as the property of the thing has before vested in him in virtue of his having compensated for its loss, it was of course his own property that he lent; and the borrower is therefore liable for its loss *when occasioned by himself*, but not otherwise. If, also, the trustee give the pledge to the pawnee, “in order that he may preserve it himself as a security for his debt,” and it be afterwards destroyed, he is entitled to take the value from the pawnee, whether he [the pawnee] were the occasion of its loss or not; for it was not given to him in the nature of *trust* or *loan*, but on terms which implied a liability to make compensation.

Rules to be  
observed in  
this instance.

Is



The pawner may commission the pawnee, or any other person, to sell the pledge, and discharge the debt; but he cannot reverse the commission, if it be included in the contract.

If the pawner constitute the pawnee, or any other person of character, an agent for the sale of the pledge, towards effecting a discharge of his debt at the expiration of the stipulated term, such agency is valid; because here the pawner has merely created an agent for the sale of his own property. If, also, such agency be expressed as an article in the contract of pawn, the pawner has not afterwards the power of reversing it; because where the agency is thus stipulated, it is one of the *rights* of the contract, and is therefore binding, in consequence of the contract being so;—and also, because, as the right of the pawnee is connected with it, the annulment of it would be a destruction of his right;—the case here being similar to that of an agent for a defendant, who has been so created at the instance of the plaintiff; for such agent cannot be dismissed from his employ but in the presence of the plaintiff.

Rules with respect to an agent appointed to sell a pledge.

If the pawner constitute any person his agent to sell the pledge, without restricting him to ready-money or credit, so as to leave him entirely at his own option in those points, and afterwards prohibit him from selling it on credit, such prohibition is of no effect; for the agency (as was before mentioned) being at first absolute, is not afterwards subject to the restriction of the pawner. In the same manner, the agent cannot be dismissed by the pawnee, as on him he is no way dependant, having been created agent by the pawner. If, also, the pawner die, the agency nevertheless continues in force; for as the contract of pawn becomes not void upon the death of the pawner, so neither does the agency, that being expressly included therein. Besides, if the contract were by this event rendered void, it would be so only with respect to the rights of the heirs of the pawner, to which the rights of the pawnee are superior. The agent, moreover, is empowered to sell the pawn without the consent of the heirs, in the same manner as he would have done in the lifetime of the pawner without his consent.—So likewise, if the pawnee should die the agency does not determine; for a contract of pawn is not rendered void, either by the

the death of both the parties, or of one; but continues, as before, with all its rights and privileges; such as possession, discharge, and the agency in question. The power of agency, however, ceases on the death of the agent; and his heir or executor cannot stand in his place; because agency is not an inheritance, the constituent being supposed to have confided in his agent alone, and not in any other person. It is recorded from *Abou Roosaf*, that the agent's executor may sell the pledge; for as the agency is binding, the executor has a power of selling it;—in the same manner as where a *Mozàrib*, after having exchanged the capital stock for any species of merchandize, dies,—in which case his executor is permitted to dispose of the merchandize, the compact being still binding. To this, however, it may be replied, that agency is the right of a principal over his factor; and the heirs of an agent can inherit only *his own* rights. It is otherwise with respect to *Mozàribat*, as the rights of that appertain to the *Mozàrib*, or manager.

A PAWNEE has not a power of selling the pledge without the consent of the pawner, as the property of it belongs absolutely to him. Neither can the pawner sell it without the consent of the pawnee; for, as the thing pledged is, with respect to its worth, the right of the pawnee, it follows that the pawner, if he were to sell it without the concurrence of the pawnee, would not have it in his power to surrender it to the purchaser.

The pawnee cannot sell it without the pawner's consent.

If, at the expiration of the stipulated term of credit, the agent refuse to sell the pledge deposited for that purpose with him, and the pawner have absconded, the *Kàzee* must compel him to execute the sale, by imprisonment, or other compulsory means, the agency being binding for two reasons;—FIRST, because, when expressly included in the contract of pawn, it becomes one of the rights thereof; and, SECONDLY, because the right of the pawnee is connected with it; and the dismissal of the agent annihilates that right. The same rules,

The agent, at the expiration of the term of credit, may be compelled to sell the pledge.

in

in short, hold in this instance, as in the case of an agent for the adjustment of a cause of dispute created by the defendant at the instance of the plaintiff; for if the defendant abscond, and the agent refuse to settle the cause, he is compellable thereunto by the *Kázee*, for the second reason above-mentioned, that the right of the plaintiff would else be destroyed. (It is otherwise with respect to a mere *agent for sale*; for if he refuse to execute the sale, he cannot be compelled thereto; as his *constituent* may still sell the article, whence his right is not destroyed.) What is here advanced proceeds on the supposition of the agency being included in the contract of pawn; for if it have not been stipulated until after the execution of the contract, there is in that case a difference of opinion; some asserting that the agent cannot be compelled to execute the sale, whilst others maintain that he may be compelled. Of these the compiler of the *Hedaya* remarks that the last is the better opinion. *Abou Yoozaf* has said that the agency is equally binding in both cases, (that is, when included in the contract, and also when made posterior thereto.) And the *Jama Sagbeer* and *Mabsoot* tend greatly to corroborate this opinion; for in treating of this species of agency they have supposed it *absolute*, and not discriminated between that included in the contract of pawn and that agreed upon posterior thereto.

If the pledge be sold by commission from the trustee, the purchase-money is substituted in place of it.

WHEN the agent of a trustee in whose hands a pledge has been deposited sells it, it is no longer in pawn, and the purchase-money stands in its place, (that is to say, is, as it were, in *pawn*,) although the agent may not yet have received it, as being the substitute for a thing which was before in his possession. Hence, if the purchase-money should be lost, by the purchaser (for instance) dying insolvent without having discharged it, the loss falls upon the pawnee; because the contract of pawn still continues in force with respect to the purchase-money, since that stands in the place of the thing sold, namely, the pledge. In the same manner, where a pawned slave is slain, and the murderer accounts for his value, the contract still continues in force,

force, as the owner of the slave is entitled to the value in virtue of his property, notwithstanding such value be paid *in atonement for blood*. The same rule also holds where a slave, having killed another pawned slave, is commuted for the one so killed,—the murderer being in that case substituted for the murdered.

If a trustee, having been appointed agent for the sale of the pledge, should sell it, and deliver the price to the pawnee by way of payment, and another afterwards prove a property in the pledge, and he accordingly pay that other a compensation for its value, it then remains in his option, either to take the value from the pawner, or the amount of the purchase-money from the pawnee: but he is not permitted to take more from the pawnee than the purchase-money.—

If the trustee, having sold the pledge and paid off the pawnee, be exposed to any subsequent loss, he may reimburse himself from either party:

The compiler of the *Hedhya* remarks that this case may occur under two different circumstances or predicaments:—I. where the pledge is destroyed after the sale; and II. where it remains whole and complete.—In the former of these, the owner of the pledge is at liberty either to take a compensation for the value from the pawner, who is an usurper of his right, or from the trustee, who has invaded it, in having sold his property and delivered it to another. Should he, therefore, take it from the pawner, the sale of the trustee becomes valid, as does also the pawnee's seizure of the price in satisfaction for his debt; because, as the pawner, by making compensation, becomes proprietor of the pledge and effaces the usurpation, it then appears that he had authorized the trustee to sell that which was *his own*.—If, on the contrary, he take the compensation from the trustee, he [the trustee] may, if he chuse, have recourse to the pawner; that is to say, he may take from him the value of the pledge; for, as being his agent, and the manager of his affairs, he is consequently entitled to an indemnification for whatever loss he may have unavoidably sustained in the execution of his commission. And in this case, also, the sale of the pledge is valid, as well as the pawnee's seizure of the purchase-money in satisfaction for his debt,—whence, in this case, he [the

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pawnee]

pawnee] cannot urge any future claim against the pawner on the score of his debt.—Or, if the trustee chuse, he may have recourse to the pawnee; that is to say, he may resume from him the purchase-money which he had unjustly received from him; *unjustly*, because it proved in the end to be the trustee's property, by his having afterwards made good the loss to the proprietor. For when he gave it to the pawnee, he supposed it to have been the property of the pawner; but he may not, perhaps, when it proves his own property, be inclined to confirm the transfer, and he is therefore allowed to resume it. As, however, the resumption of the purchase-money from the pawnee deprives him of a discharge of his claim, which the seizure of it was intended to effect, he therefore remains at liberty to demand payment from the pawner in this instance. In the *latter* of the above circumstances, on the contrary, (where the pledge remains whole and complete after the sale,) it is incumbent on the owner of the pledge to resume it from the *purchaser*, as he possesses the substance of his property; and the purchaser is entitled to a restitution of the purchase-money from the trustee, because of his being the *seller*; after which the trustee may, at his option, receive an indemnification either from the pawner or pawnee,—from the *former*, because he occasioned him to enter into the agreement, from which he is consequently bound to release him,—and from the *latter*, because, when the thing sold was proved to belong to another, the money obtained in lieu thereof is no longer termed *purchase-money*, and the pawnee having received it only as such, his seizure is no longer of effect. If, therefore, he take the value from the pawner, the pawnee's seizure of the price is rendered valid:—whereas, if he resume the purchase-money from the pawnee, his seizure being thereby destroyed, his former right (namely, the claim against the pawnee) exists as before. —All that is here advanced proceeds on the supposition of the agency having been included as an article in the contract of pawn; for if the pawner appoint the trustee his agent for the sale of the pledge *after* the contract, he [the agent] is in this case to indemnify himself for any loss

but if he was  
commissioned  
by the pawner  
after the con-  
tract, he must  
recur to him

loss he may sustain, in consequence of selling the pledge, from the *pawner*, not from the *pawnee*, notwithstanding he may have made over to the pawnee the price he had received for the pledge, since with *this* agency the pawnee has no concern, inasmuch that the pawner may rescind the agency without consulting him.

alone for indemnification.

IF a pledged slave die in the possession of the pawnee, and it be afterwards discovered that he was the property of another, not of the pawner, it remains with the proprietor to demand a compensation from either the pawner or pawnee; for both are violators of his right, —the one in having delivered the pledge to another, and the other in having received it. If, therefore, he take a compensation from the pawner, the pawnee, because of the slave having died in his possession, is held to have received payment of his debt; for as the pawner has obtained a property in the slave by indemnifying his owner, the payment of his debt is therefore effected by the slave dying in the pawnee's hands. If, on the contrary, he take a compensation from the *pawnee*, he [the pawnee] is not only entitled to an indemnificatory satisfaction from the pawner, but his claim upon him still exists as before:—he is entitled to an indemnification from the pawner, because of his having deceived him; and his claim of debt exists as formerly, because the discharge effected by the pledge having died in his possession ceases to be of force upon his making good the value, whence his right reverts.

A stranger proving his right in a pledged slave, who had died with the pawnee, may seek his compensation from either party.

OBJECTION, (by the *Kāzee Aboo Khāzim*.)—It would appear that in this case the pawnee's claim does not exist as before, but that the death of the slave in his hands establishes a satisfaction for it; because, upon the pawner compensating for the slave's value, (by the pawnee recovering such value from him as above,) he becomes, in virtue of such compensation, *proprietor* of the slave, whence it appears that he, in fact, pledged that which was *his own*, and that the case is the same as if the proprietor had taken the compensation from the

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*pawner,*

*pawner*, which would exempt him from all further obligation to the pawnee.

REPLY.—As the pawnee first pays the compensation, he first becomes proprietor of the slave from the time of possession; and when, afterwards, he retakes that sum from the pawner, his property in the slave is annulled, and the *pawner* becomes proprietor of him. The *pawner's* property in the slave, therefore, takes place, in this instance, *posterior* to the contract of pawn, (the pawnee having, as it were, *sold* the slave to the pawner, and received the price for him;)—and this debt to the pawnee remains against him as before,—whence the pawnee is entitled to take it from him. It is otherwise in the *former* alternative, (where the owner takes the compensation from the *pawner*;) for in this case the pawner becomes proprietor from the time of the slave being in his possession, (which was *prior* to the contract of pawn,) whence it may be said that he merely pawned what was *his own*;—and upon the slave dying in the pawnee's hands, he stands acquitted of his debt, which the pawnee, therefore, cannot afterwards claim from him.

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## C H A P. IV.

Of the Power over Pawns; and of Offences committed  
*by or upon them.*

**I**F the pawner sell the pledge without the consent of the pawnee, the sale remains suspended upon his will, because of his right being involved in the pledge, notwithstanding such sale be an act of the pawner with respect to what is his own property; in the same manner as where a person bequeaths the whole of his estate, in which case the legacy is suspended in its effect, with respect to the excess, above one third, upon the consent of his heirs, because of their right being connected therewith. If, therefore, the pawnee assent to the sale, it is valid; for it was before suspended only on account of his right, which he here consents to forego;—and it is also valid if the pawner discharge his debt; for the sale is an act of the proprietor upon his property, being suspended in its effect only because of an obstacle\*, which obstacle is here removed†.—In the former case, upon the pawnee having given his consent, and the sale having been thereby rendered valid, the right of the pawnee is transferred from the pledge to the thing given in exchange, namely, the price,—which, in the case here considered, then becomes a substitute for the original pledge. This is approved; because the right of the pawnee is connected with the *worth* of the pledge; and the *return* is in effect the same as the

A pledge  
cannot be  
fold without  
the pawnee's  
consent;

\* Namely, the pawnee's right connected with the pledge.

† By the discharge of the debt, which of course disengages the pledge from any claim the pawnee might otherwise have upon it.



*consideration*;— this being analogous to where an indebted slave is sold by the consent of his creditors; in which case their right is transferred from the slave to the value received for him, as they are supposed, in assenting to the sale, to have agreed to the transfer of their right from the slave to the value, but not to the total abolition of it. If the pawnee refuse his assent, and annul the contract of sale, it is null of course, (according to one tradition,) whence, if the pawner redeem the pledge, still the purchaser is not at liberty to take it; for as the right of the pawnee is equivalent to his actual property, he therefore stands the same as the proprietor of the pledge;—(whence his power of acceding to, or annulling the contract of sale.) According, however, to a more authentic tradition, the pawnee has not the power of annulling the sale; for his right can sustain no detriment, as the sale cannot, at all events, be carried into execution until he assent to it. The execution of the sale, therefore, being in this manner suspended, the purchaser has the option of waiting until the pawner may redeem the pawn, and resign it to him conformable to the contract, or of carrying the matter before the *Kázee*; for the seller has it not in his power to deliver the goods, and the power of dissolving the contract rests with the *Kázee* alone; this being similar to where a slave, having been sold by his master, elopes before the purchaser has received possession of him, in which case the purchaser may either wait until the slave return, or he may prefer a complaint to the *Kázee*, in order (as the seller is incapable of delivering the goods) to obtain an annulment of the contract.

who, if the  
pawner sell it  
more than  
once, may ra-  
tify either  
sale.

If the pawner sell \* the pledge without the consent of the pawnee, and again, before the pawnee has signified his assent, sell it to another person, in that case whichever of these two contracts the pawnee may confirm is valid; for as the first sale is dependant on the consent

\* The sale here mentioned does not signify an *absolute*, but a *conditional* sale, depending, for its ratification, upon the pawnee's concurrence, as before mentioned.

of the pawnee, it cannot prevent the second from being so likewise. If, therefore, the pawnee chuse, he may ratify the second sale. If, on the contrary, the pawner, after having first sold the pawn as above, should let, give, or pawn it to another person, and the pawnee give his consent to such lease, gift, or pawn, the sale which preceded either of these deeds is valid. The difference between these two cases is, that in the first (where one sale is made after another) the pawnee may derive an advantage from confirming either of them, (as his right lies in the price,) and whichever, therefore, he approves is valid. In the case of a lease or gift, on the contrary, no advantage can accrue to the pawnee, as his right lies in the *return* for the article, not in the *usufruct*. If, therefore, the pawnee approve of either of these, he by consequence impliedly assents to the abolition of his own right; and the previous sale (which was suspended on his consent only because of his right) becomes valid of course.

It is permitted to a pawner to emancipate the slave whom he has deposited in pawn; for as he is sane and adult, he may of course render free his own property, which the pawn indisputably is. As, moreover, the contract of pawn does not induce any destruction of the pawner's property in the pledge, his act with respect to it is not rendered void by the pawnee withholding his assent to it, notwithstanding the pawnee's right (of detention in regard to the worth) be thereby defeated;—in the same manner as where the purchaser of a slave emancipates him without having taken possession; in which case the slave is free, notwithstanding the seller's right (of detention of the article in satisfaction for the price) be thereby rendered null.

A pawned slave may be emancipated by the pawner,

**OBJECTION.**—If a person bequeath a slave to another upon his deathbed, and leave no other effects except that slave, and the heirs of the testator afterwards emancipate the slave, such manumission is not valid, because of the right of the legatee; and hence it would follow that

that a pawned slave cannot be emancipated, because of the right of the pawnee.

REPLY.—The manumission of the slave by the heirs of the testator is not (in the opinion of *Haneefa*) void, but is merely *suspended* until such time as he [the slave] shall have performed emancipatory labour.

who, if he be rich, must substitute the value in pawn for the slave;

but if he be poor, the slave must perform emancipatory labour to the amount of his value for the discharge of the pawnee's claim,

—The *sale*, moreover, or *gift* of a pawn is null, for this reason, that the pawner is unable to surrender it to the purchaser or donee,—an objection which does not obtain in the case of manumission, since in that instance a delivery is not required. The manumission is therefore valid, and takes immediate effect,—whence the contract of pawn is null, as the subject of it no longer remains. Consequently, if the pawner be rich, and the debt to the pawnee be then due, he [the pawnee] may require payment of it immediately;—or, if it be not due until after the expiration of a term, he may take from the pawner the value of the slave, and return it as a substitute until his debt become payable, when he may take it in satisfaction of his right, restoring any surplus which may remain from it to the pawner. This is supposing the pawner to be *rich*; for, if he be *poor*, the slave in question must perform emancipatory labour to an amount adequate to his value; and with this (which, if it be of a different species from the debt, must first be converted into the same) the debt of the pawnee is to be discharged; for a discharge from the pawner being here impossible, it is consequently made from him who enjoys the advantage of the manumission, namely, the slave. The slave however, when his emancipator afterwards becomes rich, is entitled to take from him the sum he earned; because he has, in fact, paid his debt, not voluntarily or gratuitously, but in conformity with the ordinance of the LAW in this particular\*.

\* The remainder of this discussion is omitted by the translator, as being merely a repetition of what has been already set forth at large under the head of *Manumission*.

If a person make a declaration of having pawned his slave, by saying to him, "I have deposited you in pledge with such a person," and the slave deny it, and the master afterwards emancipate him, at a time when he is poor, it is incumbent upon the slave to perform emancipatory labour, according to our doctors. *Ziffer* is of a contrary opinion; for he holds this case to be analogous to where a master first liberates his slave, and then declares his having pawned him;—in which case, if the master be poor, and the slave deny it, (as above,) emancipatory labour is not incumbent on the slave; and so here likewise. Our doctors, on the other hand, argue that, in the case in question, the master declares the pawn at a time when he is undoubtedly competent to it, as he still possesses a property in the slave, not having yet emancipated him; and consequently his declaration is valid.—It is otherwise where the declaration of pawn is made subsequently to the emancipation, as the master's power of pawning is then terminated;—whence there is no analogy between the cases.

although he should have denied his being in pawn previous to such manumission.

If a pawnor create the slave whom he has pawned a *Modabbir*, it is valid, according to all authorities:—according to our doctors, because, as the complete emancipation would be lawful, it follows that this qualified emancipation is lawful, *a fortiori*; and according to *Sba-feri*, because the granting *Tadbeer* to a slave does not (as he holds) prevent the sale of him. In a similar manner, it is in the power of a pawnor to constitute his pawned female slave an *Am-Walid*; for as a father has this privilege with respect to the female slave of his child, because of the right which he has in his property, notwithstanding such right be inferior to that of the child himself, it follows that the exertion of the same privilege by a pawnor, in virtue of his right in the pledge, is valid *a fortiori*, the right of the pawnor being superior to that of any other person, as he is the proprietor.—When, therefore, a pawned slave is constituted either *Modabbir* or *Am-Walid*, such slave is excluded from the contract of pawn, as the intention is defeated, since a debt cannot be discharged by means of a *Modabbir*.

A pawnor may create his pawned slave a *Modabbir* or *Am-Walid*;

and if he be rich, he must substitute the value in pawn; but if he be poor,

the slave must perform emancipatory labour to the full amount of the debt.

or *Am-Walid* \*;—whence, if the pawner be *rich*, he is responsible for the value, after the manner before shewn in the case of pawned slaves emancipated;—but if, on the contrary, he be in *indigent* circumstances, the pawnee may require from the *Modabbir* or *Am-Walid* emancipatory labour to the amount of the debt, as the fruit of their labour is the property of their master. It is otherwise in the case of a pledged slave emancipated by an indigent pawner; for the fruits of his labour being *his own* property, he is obliged to labour to the amount of his *value* only, or that of the debt of the pawner, in case of its being less than his value.

The pawner, on becoming *rich*, is responsible for the emancipatory labour in the *former* instance, but not in the *latter*.

It is not permitted either to a *Modabbir* or *Am-Walid* to resume from their master when he becomes rich what they paid on his account when poor, because they in fact paid this from *his property* †: but when a poor pawner emancipates the slave whom he had pledged, he [the slave] is entitled to take whatever he may have paid on account of his emancipator; because he has paid it from his *own property* ‡,—and this from necessity, in conformity with the precepts of the LAW, (as before observed,) whence such payment cannot be considered as *gratuitous* §. Some have said, that if the debt be not due at that time, the *Modabbir* or *Am-Walid* are compellable to earn their value; which, as being a substitute for the pawn, must be detained as such in lieu of the original: but that if, on the contrary, the debt be then due, it is in that case necessary to discharge it from the *stock* of the pawner; and as the earnings of the *Modabbir* or *Am-Walid* are considered as the property of the master, they must therefore labour towards obtaining a sum adequate to the whole of the debt.

\* Because *Modabbirs* and *Am-Walids* cannot be sold.

† The earnings of their labour being his right.

‡ The labour and earnings of a *freedman* being considered as *his own property*.

§ A person is not entitled to recover, who pays the debts of another in a *gratuitous* manner.

If a pawner emancipate the slave whom he had created a *Mudab-  
bir*, as above, it is not then incumbent on the freedman to earn a  
greater sum than his value, although he should be thereunto com-  
manded by the *Kāzee*; for, after emancipation, the fruits of his la-  
bour are his own property. Still, however, he cannot recover from  
his master what he had paid on his account prior to his freedom, as  
that was, in fact, the property of the master.

An emanci-  
pated *Mudab-  
bir* does not  
owe the  
pawnee la-  
bour beyond  
his value.

If a pawner *destroy* the thing he had pledged, the same rules hold  
as are established in the case of *emancipating* the pledge.

Destruction  
of the pledge  
by the  
pawner;

If a stranger (that is, a person unconcerned in the contract) *de-  
stroy* the pledge, the pawnee (not the pawner) is litigant against him,  
and may take from him a compensation for the value, which he must  
retain in pawn in place of the original pledge; for the pawnee, as  
being the most entitled to the *substance* of the pledge, is also most en-  
titled to its substitute, namely, the *value*. It is here to be observed,  
that the stranger must compensate for the pledge according to the  
value which it bore at the time of its being destroyed. If, therefore,  
it be valued at five hundred *dirms* at the period of its destruction, and  
at one thousand *dirms* on the date of the contract, the stranger must  
account for five hundred *dirms* to the pawnee, who must retain the  
same in pawn;—and five hundred *dirms* are remitted from the debt;  
for the deficiency to that amount is a destruction which has occurred  
in the hands of the pawnee, occasioned (as it were) by the visitation  
of heaven; and as the property has thus perished in his hands, a pro-  
portionable amount is therefore deducted from his claim.

by a stranger

If the pawnee destroy the pledge before the expiration of the sti-  
pulated term of payment, he is responsible for the value, because of  
his having destroyed the property of another;—and this value he is to  
retain in pawn until the term of payment arrive; for as it is a substi-

of by the  
pawnee

tute for the substance of the pledge, it is consequently subject to the same rule. As soon, therefore, as the debt becomes due, the pawnee may take it from the value; and if then a balance remain, it must be restored to the pawner, as being a return for his property, with which the pawnee has no concern.

A depreciation in the value of the pledge occasions a proportionable deduction from the pawnee's claim.

If a person pawn any article estimated at one thousand *dirms*, in security of a debt of the same amount payable at some future period, and the article, in consequence of a fall in the price, bear afterwards a value of five hundred *dirms*, and be then destroyed in the pawnee's hands, he [the pawnee] is responsible for five hundred *dirms*, and five hundred are also remitted from his debt; for the deficiency of five hundred *dirms* arising from the fall in the price being (as it were) a decay of part of the pawn whilst in the hands of the pawnee, an adequate sum is therefore retrenched from his claim; and the remaining five hundred *dirms* are likewise due from him in consequence of the decay, and remain with him in pawn, as before stated.

The pawnee lending the pledge to the pawner, is freed from responsibility during the loan;

but he may resume it at pleasure, and then his responsibility reverts.

If a person, having received a slave in pawn, lend him to the pawner, in order that he may enjoy the use of his service, or for any other purpose, and the pawner take possession, the slave is no longer a subject of responsibility with the pawnee; (in other words, if he be killed or lost in the hands of the pawner, the pawnee is not thence held to have received payment of his debt;) because he has passed out of the possession of the pawnee; and the seizure of the pawner in virtue of a loan does not stand as the seizure of the pawnee, as the tenure of a loan is repugnant to that of a pawn, since the latter induces responsibility, whereas the former does not. The pawnee, however, is at liberty at any time to resume the pledge from the pawner; because he holds it by the tenure of a *loan*, which is not binding; and also, because the contract of pawn still subsists, whence it is that if the pawner were to die without having returned the pledge, the pawnee

pawnee would in that case have a claim upon it in preference to the other creditors; (that is to say, he would be entitled first to take a satisfaction for his claim from the pledge; which done, if any part should remain it would be distributed among the other creditors.)

**OBJECTION.**—If a pawnee be not held liable for a pledged slave after he is lent, how is the contract of pawn supposed then to exist?

**REPLY.**—Responsibility is not, in every instance, one of the requisites of a contract of pawn;—whence it is that the effect of the contract reaches to the child of a pawned female slave, although such child be not a subject of responsibility from loss or destruction.

—As, therefore, the contract still subsists, if the pawnee resume the pledge from the pawner, he again becomes liable for it, in the same manner as formerly, having again taken possession of it in virtue of the contract of pawn.

If either of the parties to a contract of pawn lend the pledge with the concurrence of the other to a stranger, it is not in this case a subject of responsibility to the pawnee, any more than in the former instance; but the contract of pawn still continues in force, and either party is entitled to resume the pledge from the borrower, and to place it in pawn as before, from the interest each has in it.

The pledge, being lent to a stranger by either party, is no longer a subject of responsibility.

In either party, with the consent of the other, let, sell, or bestow the pawn in gift to a stranger, it is excluded from the contract, and cannot again be subject to it; unless the parties conclude a fresh agreement. It is to be observed that if, in any of these cases, the pawner die before a restitution of the pledge be made to the pawnee, he [the pawnee] is upon the same footing with the other creditors; because as, in consequence of these acts, a binding right of others is connected with the pledge, the effect of the contract no longer remains;—whereas no *binding* right is connected with a pledge in consequence of the

The pledge, on being disposed of by either party, with the consent of the other, is excluded from the contract.



the loan of it;—for which reason there is an essential difference between the cases here considered and that of loan.

If the pawnee borrow the pledge from the pawner for any particular purpose, and it be destroyed previous to his having applied it to that purpose, he is responsible for it,—that is to say, a sum proportionate to its value is retrenched from his claim; for until he apply it to that use for which he has borrowed it, the seizure which he had made in virtue of the contract of pawn still subsists. The law is similar where the pawn is destroyed after the pawnee has accomplished the service for which he had borrowed it; for then his seizure of *loan* exists no longer. If, on the contrary, it be destroyed during the period in which he enjoys the use of it, he is not responsible, as at that time he holds it in *loan*, not in *pawn*. (The same rule also holds where the pawner consents to the pawnee's making use of the pledge\*.)

A person borrowing an article, with intention to pawn it, is restricted in the pawn according as he specifies the particulars of the debt, &c. or otherwise;

If a person borrow a robe from another, with an intent *generally* declared “to pawn it,” he may accordingly pawn it in security for any debt whether great or small;—whereas, if the lender particularly specify the sum in security for which the borrower may pawn the robe, he is not, in that case, permitted to pawn it for a sum either larger or smaller than what is so specified;—not for a *larger* sum, because the intention of the lender is, that the robe shall be pawned for a debt which may be easily discharged, an intention which is obviously defeated in the case of pawning it for a *large* sum;—nor for a *smaller* sum, because the view of the lender here is, in case of its loss, the

\* That is,—where the pawnee, being already possessed of the pledge, obtains the owner's consent to make use of it.—For the elucidation of what is here advanced it is proper to remark, that a pledge may either be delivered to the pawnee, given in trust to an *Adil*, or retained in the hands of the owner [the pawner] under a responsibility to account for it if necessary.

obtaining from the pawner that sum which he would receive from the pawnee in consideration of the extra value of the pledge. The same rule also holds where the lender specifies either the particular species of debt, the person who is to receive the pawn, or the city in which the contract is to be concluded;—such restrictions being severally attended with particular advantage; for the payment of some debts is more easily effected than of others,—and it is also more convenient to make payment in some cities than in others, and so likewise it is of advantage to particularize the persons, as some men are just and careful, whilst others are not so. If, therefore, in any of these cases, the borrower act contrary to the directions of the lender, he becomes responsible for the value of the article in case of loss;—and when this happens, the lender has it in his option either to take a compensation from the borrower, (in which case the contract of pawn subsists entirely between the borrower and the pawnee, since the former, by paying a compensation for the pledge, becomes sole proprietor of it,) or from the pawnee, who will take an indemnification from the pawner, and likewise receive payment of his debt, as has been before explained in the cases of claims laid to pledges. If, on the contrary, the borrower conform to the directions of the lender, by pawning the robe for the exact sum to which he was restricted, and the value of the robe be equal to, or greater than the amount of the debt, the pawnee is held, in case of its loss, to have received payment of his debt, and the proprietor of the robe receives from the pawner the amount of the debt, being the sum which the borrower had cleared by means of his property;—(and it is on this account that the borrower must pay the amount of the debt,—*not* because he was seized of the robe, as that was in virtue of a free loan from the proprietor.)—In the same manner if, when the pawner had conformed to the direction of the lender, the robe be in any degree depreciated, the pawnee forfeits a proportionate part of his claim, and a like sum is due from the borrower to the lender, because of so much having been retrenched from his debt. If the value of the robe be short of the amount of the debt, and it be  
lost

and if he transgress, is responsible for the value in case of loss:

lost in pawn, a sum equivalent to its value is retrenched from the claim, and the remainder of the debt is due from the pawner, as no discharge of debt is effected beyond the amount of the value of the robe; and the pawner is, moreover, indebted to the lender for the value of the robe, having by means of it made payment of as much of his debt.—If, also, the value of the robe be adequate to the amount of the debt, and the proprietor be desirous of redeeming his property, on the part of the pawner, by paying the amount, the pawnee is not in that case allowed to object to the restoring of it; because the robe being the property of the lender, he does not, consequently, by redeeming it, officiously intermeddle in an affair which does not concern him; (whence he is entitled to take from the pawner [the borrower] the sum which he pays towards the redemption of the pawn;) and the *Kâzee* must therefore compel the pawnee to surrender the robe. It is otherwise where an unconcerned person pays the debt of the pawner; for as, by endeavouring to redeem a thing which is not his own property, he interferes in a business which does not relate to him, the pawnee is not therefore compellable to surrender the pledge to him.

but not if it  
be lost before  
pawn, or after  
redemption.

If the borrowed article be lost in the hands of the borrower, either prior to his having pawned it, or posterior to his having redeemed it, he is not responsible; for here he has not accomplished any discharge by means of the value, which (as we have shewn in the above case) is the sole cause of responsibility.

On disputes  
concerning  
the loss of the  
pledge, the  
deposition of  
the borrower  
is credited  
with respect  
to the person

If a dispute arise between the lender and borrower after the loss of the pledge, the lender asserting that it had been lost whilst in the hands of the pawnee, and the borrower on the other hand maintaining that it was lost in his *own* possession, either before he had pawned it or after he had redeemed it, the declaration of the borrower, upon oath, must be credited, because he is, in this case, the defendant, as he

he denies having paid the debt by means of the others property.—If, on the contrary, they disagree concerning the amount of the debt to which the lender had restricted the pawning of the robe, the declaration of the *lender* is credited; for as his deposition would be credited if he were to deny the loan itself, it follows that where he merely denies a *quality* of the loan it is credited *a fortiori*.

in whose hands it was lost, and that of the *lender* with respect to the restrictions of the loan.

If the borrower of the robe pawn it on the faith of a promise,—that is, on a person promising to lend him a certain sum of money, and that person accept the pledge, and make the promise accordingly, and the pledge (which is supposed to be equal to the amount of the debt) be lost before the pawnee had fulfilled his engagement, he [the pawnee] is in that case responsible for the sum so promised, as a promise is held to be the same as a real debt;—and the lender is entitled to receive from the pawner the sum which he takes from the pawnee.

A person receiving a borrowed article in pledge on the faith of a promise, must pay the sum promised to the pawner, who again pays the same to the lender.

If a person lend his slave to another, that he may pawn him, and the borrower pawn him accordingly, and the lender afterwards emancipate him, he is accordingly free; for the owner's property in him is not destroyed by the circumstance of his being pawned. And in this case the pawnee may either receive payment of his debt from the pawner, (who is still indebted to him,) or he may take from the lender the value of the slave by way of compensation, as the right which he had in the worth of the slave was destroyed by the lender emancipating him;—and having thus received the value, he may retain it in pawn until such time as he obtain payment of his debt, upon which he must restore the said value to the owner.

The lender of a *slave* to pawn may emancipate him, lodging the *value* with the pawnee, in substitute for the pledge.

If a person borrow a slave or a camel with intent to pawn it, and having first employed the slave in service, or rode upon the camel, he then pawn it in security of a debt adequate to its value, and having afterwards

The borrower transgressing upon the article (before pawn or after

redemption) and then ceasing from such transgression, is not responsible in case of loss.

afterwards discharged the debt, the pledge be completely destroyed in the hands of the pawnee before restoration, in that case the pawner is not responsible; for when he concluded the pawn he became ~~except~~ *from* responsibility, notwithstanding he had previously enjoyed the usufruct; since although he at first transgressed, yet he afterwards retracted, and acted in conformity with the intention of the lender. In the same manner, if the pawner, after having redeemed the pledge, employ it in service, without occasioning any detriment to it, and it be afterwards destroyed by some unforeseen contingency, he is not responsible; because the term of the loan having expired upon the redemption of the pawn, he is no longer a *borrower*, but becomes from that period a *trustee*; and although, in taking the service of the pawn, he was guilty of a transgression, yet as he afterwards retracted and conformed to the intention of the lender, he becomes thenceforth free from all responsibility. It is otherwise in the case of a person who has borrowed any thing not with an intent to pawn it; for his seizure, being derived merely from the loan, is not therefore the same as that of the proprietor, to whom he is consequently bound to restore the thing which he borrowed. In the case, on the contrary, of a loan with intent to *pawn*, when the thing is pawned the object of the lender is obtained; for his view is to have recourse to the borrower; that is to say, that when the pawn is destroyed in the possession of the pawnee, and a discharge of debt thereby proved, he may take from the borrower a sum adequate to what he is held to have discharged by the loss of the pawn: wherefore if it be destroyed in the hands of the borrower, without a transgression on his part, he is not responsible.

A pawner destroying the pledge, is responsible to the pawnee for the value;

If the pawner kill the slave whom he had pledged, he is responsible for the value; because by the murder of the slave he destroys the right of the pawnee, which is sacred and inviolable; and a right of this nature, attaching to the property of any person, renders him [the proprietor] the same as a stranger with respect to responsibility; like the connexion]

connexion of the right of the heirs with the property of a dying person, which prevents the effect of his gratuitous acts in any thing beyond the third of his estate; or like the connexion of the right of a legatee with the legacy bequeathed to him, which, if the testator's heirs should destroy the article [bequeathed to him in legacy,] renders them responsible for the value as a substitute.

If the pawnee commit any offence upon the pledge\*, a sum is remitted from his debt equivalent to the atonement for such offence; because the *substance* of the pledge belongs to the proprietor [the pawner;] and as the pawnee has transgressed upon it in this instance, he is consequently responsible to the proprietor for having so done.

and so in proportion for any injury he may do to it.

If a pledged slave be guilty of an offence against the pawner, either in person or property, such offence is of no account,—that is to say, is not attended with any effect;—and in this our doctors have been unanimous; for as the offence is here committed by the *property* on the *proprietor*, the cognizance of it would tend to no advantage. (By the *offences* here alluded to is to be understood merely such as induce *fine*, not such as occasion *retaliation*.)

Anyisable offence committed by a pledged slave upon either the *person* or *property* of his pawner is of no account;

If a pledged slave be guilty of an offence against the person of the pawnee, this likewise (in the opinion of *Haneefa*) is of no account.—The two disciples have judged otherwise.—The argument adduced by them is that as, in this case, the offence does not affect the proprietor, an advantage may be derived from a cognizance of it, since the slave may be made over [to the pawnee] in reparation of the injury.—The offence is therefore of account in this instance; and such (according to them) being the case, it follows that if the pawner and pawnee

nor such offence committed by him upon the *person* of the *pawnee*.

\* Such as by *maiming*, or otherwise.

concur in dissolving the contract of pawn, and the pawnee either deliver the slave, or pay a sum to the pawnee in atonement for the offence, the obligation of debt is void \* :—but if the pawnee should signify that “ he does not desire *any* compensation for the offence,” the slave remains in pawn as before. The argument of *Haneefa* is, that no advantage can possibly result from taking cognizance of the offence in question; for if cognizance of it be taken on account of the pawnee, it is then incumbent on him to extricate the slave from the guilt in which he is involved †; wherefore he must first pay the ex-piatory sum, and then again receive it, in which there is evidently no advantage.

not upon his  
property, pro-  
vided his va-  
lue do not  
exceed the  
debt for  
which he  
stands  
pledged.

If a pledged slave commit an offence upon the property of the pawnee, such offence is of no account, according to all our doctors, provided the value of the slave be adequate to the amount of the debt; for here no advantage can result from taking cognizance of the offence; as the remedy applicable in this case is an appropriation of the slave to the pawnee, in compensation for the injury he had sustained,—a remedy which cannot here be effected, as the slave is not *made over* in atonement for the offence, but is *sold*, and a compensation for the injury he has done to the property of the pawnee discharged from the purchase money;—and as the sum appropriated to the discharge of the compensation is deducted from the debt, there is finally no advantage in taking account of the offence in this instance. If, on the contrary, the value of the slave exceed the amount of the debt, there are two opinions recorded from *Haneefa* upon the case.—One is, that the offence may be redressed in the proportion in which the value [of the slave] exceeds the debt, a pledge being a trust with respect to any

\* Because the slave here appears to have been “ *lost in the hands of the pawnee*,” a circumstance which liquidates his debt.

† Because he is possessed of the slave in a way which induces responsibility.

excess,

excess; and the injury in this case being similar to that committed by a slave in deposit on the property of the trustee. The other is, that the offence cannot be redressed at all; for as the effect of the contract of pawn (namely, the detention of the slave on account of debt) applies to the excess as well as to any other part of the pledge, it may therefore be said that he is a subject of responsibility *in toto*.

If an offence be committed by a pledged slave on the son of the pawnier or pawnee, it is cognizable; for, as the right of property of a father is, in reality, distinct and separate from that of his son, the crime is therefore the same as if committed upon a stranger.

but his offence against the son of the pawnee is cognizable.

If a person pawn a slave estimated at one thousand *dirms*, in security for a debt of the same amount, payable at some future period; and the value of the slave be afterwards lowered to one hundred *dirms* from a fall in the price\*, and a person then kill the slave, and pay a compensation of one hundred *dirms*, (being the value he at that time bears,) and the time of payment arrive, the pawnee must in this case keep possession of the hundred *dirms* aforesaid in lieu of his debt, and has no further claim whatever upon the pawnier.—This is founded upon an established rule, that no regard is paid to any depreciation of a pledge from a fall in the price, regard being had solely to the value it bore at the time of the contract of pawn;—whence it is that (as is here mentioned) a diminution of the value of a pledge from a fall in the price does not occasion a remission of the debt, according to our doctors:—contrary to the opinion of *Ziffer*, who contends that, upon the pledge sustaining any loss with respect to its *worth*, it may be said to sustain a loss with respect to the *substance* also. The argument of our doctors is, that a fall in the *price* arises merely from a decrease of desire in men towards the article,—a circumstance to which no regard

If the pledge be destroyed after depreciation, the pawnee must remain satisfied with the compensation he receives from the destroyer;

\* That is, from a fall (for instance) in the *current* or *market* price of *slaves*.

is



is paid in the case of *sale*, (whence the purchaser has no option in consequence of any casual fall in the market, but owes the whole price agreed for,) nor in the case of *usurpation*, (whence an usurper, upon restoring the article he has usurped, is not responsible for any depreciation it may have sustained in the interim of usurpation from a fall in the price.) As, therefore, no part of the debt is remitted in consequence of a fall in the price, the slave continues in pledge, opposed to the whole of the debt;—and upon any person killing him, he pays the value which he [the slave] then bears, namely, one hundred *dirms*; (for, in exacting compensation, regard must be paid to the value at the time of the destruction taking place; )—and the pawnee takes the hundred *dirms*, as being a compensation for the worth of the pledge with respect to the owner of it. But, after this, the pawnee has no further claim on the pawner; because the seizure of the pawnee stands as a seizure of payment from the time of his obtaining possession of the pledge, which payment is confirmed in the event of the loss of the pledge whilst in his possession. The value of the slave, moreover, at the beginning was one thousand *dirms*, and upon his being destroyed in the hands of the pawnee, he [the pawnee] is accounted to have received payment of his *whole debt* in virtue of his original seizure. But since, in consequence of his having received one hundred *dirms*, it is impossible that he can also be thus accounted to obtain payment of one thousand *dirms* (the original value of the slave) without inducing usury, the matter is therefore settled thus,—that he received these hundred *dirms* as part payment of his debt of one thousand *dirms*, and that there still remain nine hundred *dirms* annexed to the substance of the pledge; and that, upon the pledge being destroyed in his possession, he is in consequence of such destruction accounted to receive payment of nine hundred *dirms*. It is otherwise where the slave dies a natural death in the hands of the pawnee; for as, in that case, there can be no imputation of usury, he is therefore held to have received payment of the *whole* of the debt in that instance.

If a person pawn a slave estimated at one thousand *dirms* in security of a debt of the same amount, and the value of the slave be afterwards lowered to one hundred *dirms* by a fall in the price, and the pawnee be authorized by the pawner to sell the slave, and accordingly sell him for one hundred *dirms*, and take possession of the price towards the discharge of his debt,—he is still entitled to receive from the pawnee the remaining nine hundred *dirms*; for as the pawnee sold the pledge at the instance of the pawner, it is in effect the same as if the pawner had taken it back and sold it himself,—in which case the agreement would be dissolved, and the debt would continue in force, except in regard to that sum which the pawnee had received,—and so here likewise.

but if (after such depreciation) he sell it by desire of the pawnee for payment of his claim, he is still entitled to any deficiency.

If a person pawn a slave valued at one thousand *dirms* against a debt of the same amount, and afterwards a slave valued at one hundred *dirms* kill the slave in pawn, and having been given in compensation for his blood, be detained in pawn in lieu of him, the pawner is in that case compellable to redeem him by the payment of the whole of the debt, namely, one thousand *dirms*. This is the opinion of *Hanneefa* and *Aboo Yoosaf*. *Mohammed* maintains that the pawner is in this case at liberty either to redeem the pledge by discharging the whole of the debt, or to transfer the property of it to the pawnee as a commutation. *Ziffer*, on the other hand, contends that the slave who perpetrated the murder is to remain in pawn in security of one hundred *dirms*; and that the remaining sum of nine hundred *dirms* is accounted to be discharged; because (as he argues) the seizure of the pawnee in virtue of the contract is a seizure of payment, which is fulfilled in this case by the destruction of the pledge: but as the pledge has left behind it a return or consideration, equivalent to the tenth part of the debt, such part is therefore still due, and the slave is detained in pawn in security thereof. The argument of our doctors is, that in this case no part of the debt is remitted; because the second slave is a substitute for the first, in regard merely to *flesh and blood*, (that is, in regard to appearance;)

The pawner must redeem a slave of less value (received by the pawnee in compensation for having slain the slave in pledge) by payment of his whole debt.

*appearance*;) and as, in case of the existence of the *first* slave, if the value were to be diminished by a fall in the price, still no part of the debt (as we have before shewn) would be on that account annulled,—so neither is any part annulled when another slave is substituted for the one originally pledged. *Mohammed* has indeed said that the pawnee may nevertheless refuse to redeem the pledge; for when a change and diminution of value took place in the pawn whilst in the possession of the pawnee, (which is a cause of responsibility,) the pawner became empowered to object to the redemption of it;—in the same manner as where a slave kills a purchased slave antecedent to the delivery of him, —in which case the purchaser has it at his option either to accept the slave who committed the murder in lieu of the one he purchased, or to annul the contract [of sale.] To this, however, the two *Elders* reply, that upon the second slave being, with regard to appearance, substituted for the first, it may be said that no change takes place in the identity of the slave; and as the substance of a pawn is a *trust* in the hands of the pawnee, it follows that the pawner cannot render it the property of the pawnee unless he should consent thereunto.—Moreover, the transfer of a pledge in commutation of the debt to which it stood opposed was a common practice in times of ignorance, but has since been proscribed by the LAW. It is otherwise with respect to the case of sale adduced as a parallel by *Mohammed*; for there the buyer has the option of annulling the contract of sale; and the annulment of sale is permitted by the LAW.

The fines incurred by a pledged slave must be defrayed by the pawnee;

If a pledged slave slay a person by misadventure, the fine of blood is in that case chargeable to the pawnee, who must defray it accordingly:—nor is he at liberty to commute the slave for it, as he has not the power of transferring the property of him to any person. If, therefore, the pawnee discharge the whole fine, the slave is thereby rendered pure; and the stains of guilt being thus effaced, his [the pawnee's] claim of debt subsists as before: but he is not entitled to make any demand on the pawner on account of the sum which he paid

paid in expiation of the crime of the slave; for as it was committed whilst in his possession, (a circumstance which occasions responsibility\*,) the atonement for it therefore rests upon him. If, however, the pawnee object to the payment of the penalty, the pawner must in that case be ordered either to pay the fine, or to make over the slave in lieu of it; for the pawner is the *proprietor* of the slave; and the fine was chargeable to the pawnee merely for this reason, that his right is connected with the slave [in virtue of *pawn*,] and not because of his being in any respect the *proprietor*. Upon his refusal, therefore, the claim of atonement for the offence lies against the pawner, as being proprietor of the slave; and the atonement, in the present instance, is either paying the fine of blood, or making over the slave in lieu of it. If the pawner adopt the *latter* alternative, his debt to the pawnee is held to be completely discharged; for the transfer having been incurred by an offence committed by the slave whilst *in the pawnee's possession*, he therefore, as it were, *perishes in his hands*. If, also, he adopt the former alternative, (that of paying the *fine*,) his debt is extinguished; for as the slave was (as it were) *lost* by the offence, the recovery of him was incumbent on the pawnee, by the payment of the atonement. Upon the pawner, therefore, discharging such atonement, he, as it were, retrieves the slave, and is consequently entitled to payment from the pawnee; for which reason the debt is held to be annulled. It is otherwise where a person pawns a slave girl who bears a child whilst in the possession of the pawnee; for if that child should either kill a man, or trespass upon any person's property, it is incumbent on the pawner in the first instance to make over the child in expiation for the murder, or in compensation for the damage he may have occasioned; as the child is not a subject of responsibility with the pawnee. If, therefore, the child be given in lieu of the blood or property, it is excluded from the contract of pawn,

but if he refuse, they are defrayed by the pawner, who charges the pawnee accordingly, in liquidation of his debt.

\* The *immediate possessor* of a slave is in a certain degree responsible for his conduct.

but is not deducted from the pawnee's debt,—in the same manner as where it dies a natural death:—or if, on the other hand, he pay the atonement, the child in that case remains in pawn with its mother as before.

Rule with respect to the debts incurred by a pledged slave destroying the property of a stranger.

If a pledged slave destroy the property of any person to an *equal* or *greater* amount than his value, and the pawnee discharge the debt thus incurred by the slave, his claim upon the pawner holds good as before, in the same manner as where he pays a pecuniary atonement for any *offence* committed by the slave. In case, however, of his objecting to such payment, the pawner is then required either to sell the slave towards discharging of the debt, or to pay it himself. If he adopt the *latter* alternative, the claim of the pawnee is cancelled, in the same manner as explained in the example of *atonements*. If, on the contrary, he prefer the *former* alternative, and (declining to pay the debt himself) sell the slave towards the discharge of it, in that case the person who sustained the injury must first take what is due to him from the price, (his claim having preference to that of the pawnee,) and then, if any thing remain, enquiry must be made whether the claim of the proprietor of the goods was *greater, equal* to, or *less* than that of the pawnee?—If it be either *equal* to, or *greater* than the claim of the pawnee, the residue of the price is appropriated to the pawner, and the debt of the pawnee is held to be annulled; for upon the slave being sold towards the discharge of a debt attaching to him in consequence of an offence committed whilst in the possession of the pawnee, the case becomes in effect the same as if he had been destroyed in the pawnee's possession. If, on the contrary, the claim of the proprietor be less than that of the pawnee, the claim of the pawnee is in that case annulled only in proportion to the sum disbursed to the proprietor; and the remainder is detained in pawn in lieu of the slave;—wherefore, if the pawnee's debt be at that time due, he may then take this sum as a satisfaction for it; but if the term of payment should not have arrived, he must retain it in his

hands until his debt become payable. If, on the other hand, it should so happen that the price of the slave does not altogether suffice towards the discharge of the proprietor's debt, he [the proprietor] may in that case take the whole of the price, but without making a demand on any person for the remainder, until such time as the slave may have become free; for his right relates to the slave; and as the slave has been sold towards making satisfaction for it, his claim therefore to whatever part of the right may not have been thus discharged, is suspended until the slave obtain his freedom, when it may be again urged;—and if the slave, after obtaining his freedom, should thus discharge the remainder, he is not then entitled to claim a reimbursement from any person, as the money he disbursed was due from him on account of his own act.

If a person pawn a slave valued at *two* thousand *dirms* in security of a debt of *one* thousand, and the slave commit an offence, in that case the pawner and pawnee must *both* be ordered to pay the atonement\*; for a moiety only of the slave is insured with the pawnee, the other moiety being with him as a *trust*; and accordingly the atonement for the *insured* moiety is chargeable to him, and that of the other moiety to the pawnee. If, therefore, the pawner incline to give the slave as a composition for the offence, and the pawnee assent thereto, his [the pawnee's] debt is extinguished. If, on the contrary, the parties disagree, (one of them inclining to give the slave in composition, and the other wishing to discharge the atonement,) the declaration is in that case accepted of the party who prefers paying the atonement, whether it be the pawner or pawnee; for if the *pawnee* pay the atonement, still the right of the pawner is not annulled; whereas the pawner, in commuting the slave for the penalty, would destroy the

If the value of the slave be twice the amount of the debt, the fines incurred by him are defrayed equally by both parties.

\* This does not mean that *each* is to pay the atonement, (for that would be to pay it *twice*,) but that the obligation of atoning for the offence rests upon the *one* as well as upon the *other*.

right of the pawnee. If the *pawnee* pay the atonement, a part of the payment, in proportion to the part [of the slave] he held in *trust*; is considered as *gratuitous*, (for this reason, that if he had not chosen to pay it, the matter would have rested upon the *pawner*;) and such being the case, he has no claim upon the *pawner* for an indemnification.—If, on the contrary, the pawnee refuse to pay the atonement, and the *pawner* discharge the whole, a moiety of it is in that case placed to the account of the pawnee;—(that is to say, is deducted from his claim;) for as, in all cases where pledged slaves commit a crime, the debt of the pawnee is held to be extinguished upon the *pawner* either making over the slave, or paying the atonement, it follows that the *pawner*, in paying the atonement, does not act *gratuitously*. As, therefore, a moiety of the atonement is due from the pawnee, if such moiety be equal to, or greater than his claim, the whole of his debt is extinguished; or, if it be *less*, a proportionate part; whilst the slave is detained in pawn in security of the part remaining due.

The executor of a deceased *pawner* may sell the pledge, and discharge the debt, with the pawnee's consent.

If a *pawner* die, his executor is empowered to sell the pledge, and discharge the debt, provided he obtain the consent of the pawnee; for as the executor represents the *pawner*, he has consequently the same power and privilege as had appertained to *him* during his lifetime. But if a *pawner* die without leaving an executor, it then belongs to the *Kâzee* to appoint a person to act in that capacity; as it is his duty to conserve the rights of those who are themselves incapable of maintaining them; which purpose is fulfilled in the appointment of an executor, who may discharge the debts of the deceased, and receive payment of his claims upon others.

An executor cannot pawn effects of the defunct to

If an executor pawn part of the effects of the defunct to one of his creditors, it is illegal, and the other creditors may compel him to revoke the pawn;—for an executor, not having the power

of

of paying some of the creditors, and of excepting others, cannot therefore give pledges to some and not to others; as a pledge is held to be the same, in effect, with an actual *payment*. If, therefore, the executor should, in the mean time, discharge the claims of the other creditors, the pawn which he before made is valid, since in satisfying them he removes the bar to its legality. But if the defunct should leave only one debt against him, in that case the executor is justified in pawning part of the effects in security of it; for, since he has a power of giving part of the effects in payment of the debts of the deceased, he may consequently deposit part of them in pledge; and if, afterwards, he sell the pledge as a means of discharging the debt, it is lawful, because the sale of the effects of the defunct with a purpose to pay off his debts being lawful when they are *not* pawned, it is consequently so likewise when they are pawned.

any particular creditor,

unless there be only one.

If an executor take a pawn in security of a debt due to the defunct, it is lawful; because the seizure of a pawn is the same as a receipt of payment; and it is the duty of an executor to receive payment of the debts of the deceased. (A more particular explanation of the powers of an executor, with respect to pawns, shall be given in treating of *Executorships*.)

He may receive pledges in security of a debt owing to the defunct.



## SECTION.

*Grape-juice still remains in pawn after having become wine, and then vinegar.*

If a person pawn, in security of a debt of ten *dirms*, a quantity of the juice of grapes of the same value, which afterwards becomes wine\*, and then vinegar, and the value of the vinegar be also ten *dirms*, it in that case remains in pawn for the debt of ten *dirms*; because whatever is fit to be *sold* is likewise fit to be *pawned*, since *worth* is requisite to the fitness in the *one* instance as well as in the *other*; and wine, although not at *first* qualified for sale, does yet possess that fitness ultimately;—whence it is that if a person purchase the juice of grapes, and it become wine prior to his taking possession, still the compact of the sale is not dissolved; but the purchaser has, in such case, the option of either adhering to, or receding from the bargain; as the goods which he purchased, having been *changed*, are thereby as it were *damaged*.

*A pledge destroyed in part is still retained in pawn with respect to the remainder.*

If a goat, estimated at ten *dirms*, having been pawned for a debt of the same amount, should afterwards die, and its skin be preserved so as to bear a value of one *dirm*, it is detained in pawn in security of a like part of the debt; for as a contract of pawn is completed and perfected by the destruction of the pledge, (since the object of it, namely, a payment of debt, is then obtained,) it follows that where a part of the pawn remains, the contract continues in force in proportion to that part. It is otherwise where a goat, having been sold, dies before the purchaser takes possession, and the skin is preserved;

\* By fermentation. (For an explanation of this, see *Prohibited Liquors*.)

for

for in that case the contract is completely void,—(that is to say, it does not subsist even in regard to the *skin*;)—because sale is rendered void, and entirely done away, by a destruction of the goods before the delivery of them to the purchaser; and such being the case, it cannot (in this instance) revert with respect to the skin.

EVERY species of increase accruing from a pledge after the execution of the contract, (such as *milk, fruits, wool, or progeny,*) belong to the pawner, as being the offspring of his property:—but they are, nevertheless, detained with the original in pawn; for branches are dependant on the stock; and the contract of pawn, being of a binding nature, extends over all its branches. If, however, this offspring be destroyed in the pawnee's hands, he is not responsible for it; because no part of the sum opposed to the original is opposed to the *offspring*, as *that* was not originally included in the contract, since the proposal and acceptance which form the contract did not relate to, or comprehend it. If, on the contrary, the *original* be destroyed, and the offspring remain whole, it is incumbent on the pawner to redeem the same, by paying its proportionate value; that is to say, the debt must be divided proportionably to the value which the original bore at the time of concluding the bargain, and that which the offspring bears at the time of redeeming it; and the proportion given to the original is, upon the loss of it, held to be annulled; but that of the offspring remains due, and must be paid by the pawnee towards the redemption of it\*. (A variety of cases are determined by this rule, several of which

Any increase accruing from the pledge is detained in pawn along with it.

\* As this is somewhat obscure, it may be proper to render it more clear, by a statement of the case according to the rules of proportion. Suppose, therefore, the debt to be one hundred *dirms*, the original pledge valued at one hundred, and its offspring at fifty,—in that case the original and offspring, amounting to one hundred and fifty *dirms*, are pawned in security of one hundred *dirms*.—Now, in order to know the proportions of pawn which the original and the offspring respectively bear to the whole debt, the latter must first be multiplied by the original; and the multiple divided by the whole value of both

which are set forth in the *Kafâyat-al-Moontibee*; and the whole are enumerated in the *Jama Sagbeer* and *Zeeadât* )

The pawnee, using the product from the pledge by permission of the pawner, is not liable for any thing on that account.

IF a person, having pawned a goat, desire the pawnee to milk it, giving him, at the same time, permission to enjoy whatever quantity he might milk, and the pawnee act accordingly, he is not liable to compensate for the milk he may have thus consumed, nor is his claim, on that account, in any measure diminished, since he used the milk at the instance of the pawner. If, therefore, the goat die unredeemed in the hands of the pawnee, the debt owing to him must be divided into two parts, proportionate to the value of the goat and of the milk; and that part opposed to the goat is cancelled; whilst the other part, opposed to the milk, remains due from the pawner; because, although the milk be the property of the pawner, yet as the pawnee consumed it by his desire, the case is the same as if the pawner had himself taken and destroyed it. The pawnee, therefore, is not answerable for the milk: but [if the goat die] his claim still exists with respect to that proportion which corresponds with it. The same rule also obtains with regard to the offspring of a goat, which a pawnee eats at the desire of the pawner; and, in fine, with respect to every increase accruing from pledges posterior to the contract.

The pledge may be augmented, but not the debt.

THE augmentation of a pledge is lawful, in the opinion of all our doctors;—as where, for instance, a person, having pawned a slave for a debt of one thousand *dirms*, afterwards gives the slave a garment to be detained likewise in pawn in security of the same debt;—in which

both [original and offspring] and the product gives the proportion of the original; after which the same process must be observed with respect to the offspring;—when the calculation will stand thus:

150 : 100 :: 100—66½ the proportion of the original pledge.

150 . 100 :: 50—33½ the proportion of the offspring.

case

case the addition so made to the original pledge is lawful, and the garment is included in the agreement; the case being, in short, the same as if the slave and garment had been originally pawned together. On the other hand, the increase of a debt in security of which a pawn has been taken is not lawful, (according to *Haneefa* and *Mohammed*;) that is to say, the pledge opposed to a particular debt does not also stand opposed to any *increase* upon it. *Aboo Yoosaf* holds that *both* debts are liquidated.—The addition to a pledge, as here stated, is termed *Zeeâdit Koofdee*, or *intentional increase*\*; and the debt is to be between the value the *original* pledge bore at the time of pawning it, and that which the *addition* bears on the day of its delivery.—Hence if the value of the latter was then five hundred *dirms*, and that of the original pledge at the time of concluding the agreement one thousand, and the amount of the debt likewise one thousand, the debt is in that case divided into three shares, two of which are opposed to the original pledge, and the remaining one to the increase; and according to this proportion they are respectively charged for, if lost or destroyed in the hands of the pawnee.

If a person, in security of a debt of one thousand *dirms*, pawn a female slave of the same value, who afterwards brings forth a child likewise estimated at one thousand *dirms*, and the pawner then increase the pledge by the addition of a slave also valued at one thousand *dirms*, (saying to the pawnee, “ I have added this slave to the child of the pledge,”) the slave is in that case pawned with the *child* only. If, therefore, the child afterwards die, the slave is no longer in pawn, inasmuch that the pawner may resume him from the pawnee without making him any return. If, also, the *slave* should die, or be lost, nothing is chargeable on that account to the pawnee.—If, on the other hand, the *mother* should die, the debt must in that case be divided between the value she bore at the time of concluding the contract,

Case of increase to a pledged female slave.

\* To distinguish it from *accidental* increase by *breeding*, *vegetation*, &c.

and that which the child bears on the day of redemption;—and since the slave was attached solely to the child, the share of the child must therefore be proportionably divided between it and the slave, agreeably to their respective values, in order that if either of them should die he may be charged for accordingly. If, on the contrary, the pawner attach the slave to the *mother*, (saying to the pawnee, “I have placed him with *her* in addition to the pledge,”) the debt must in that case be proportionably opposed to the mother and the slave, according to the value which they severally bore at the time of seizure; and from the sum opposed to the mother a proportionate part must be allotted to the child; for the pawner, in having placed the slave with the *mother*, joined him (as it were) to the original matter of the agreement; whence the child is included in the proportion of the *mother* only.

Case of a  
pawner com-  
mitting *one*  
slave in pawn  
for *another*.

If a person pawn a slave valued at one thousand *dirms* in security of a debt of the same amount, and afterwards give the pawnee another slave, likewise of the same value, to be detained in place of the former, in that case the first slave is considered as being in pawn until such time as the pawnee restore him to the pawner in the way of annulment, the second slave being merely a *deposit* in his hands until he be regularly rendered a substitute for the other; for the first slave was included in the responsibility of the pawnee only because of his being possessed *in security of debt*; and as both the seizure and the debt still exist, the slave therefore continues a subject of responsibility until the seizure be formally voided; and such being the case, the pawnee is not liable for the *second* slave, as the parties intend *one* of them only to be included in the pawnee's responsibility:—but upon the pawnee restoring the first slave to the pawner, he becomes responsible for the second.

The pawnee  
is not respon-  
sible for the  
pledge after

If the pawnee acquit the pawner of the debt, or bestow it on him in gift, and the pledge be afterwards destroyed in his [the pawnee's] possession, he is not responsible for it, according to our doctors, pro-

ceeding upon a favourable construction of the LAW:—contrary to the opinion of Ziffer. The reasons for a favourable construction of the LAW in this particular are twofold.—FIRST, a pledge is insured on two conditions;—*one*, that it be actually possessed by the pawnee; and *another*, that it be opposed to a debt either *due* or *promised*. Now compensation for a pledge in the case of a debt then due, is made in this manner,—that if the pawn be lost in the hands of the pawnee, his debt is extinguished, provided the value of the pledge be adequate to the amount of the debt; whereas compensation in the case of a *promised* debt is made by constraining the pawnee, in case of the decay of the pledge in his hands, to make good to the pawner the sum he had promised;—and in a case where the pawnee acquits the pawner of the debt, or bestows it on him in gift, the *second* condition is wanting, as no debt exists in that instance either *due* or *promised*. SECONDLY, one object of a pawner in delivering the pledge to the pawnee is that, in case of its loss, he may be absolved from any further obligation; but where the pawnee acquits the pawner of the debt, and the pawn is afterwards lost in his hands, the desire of the pawner being accomplished, the pawnee is not therefore liable for it; (unless, however, the pawnee, having remitted the debt, refuse to restore the pawn, and prevent the pawner from resuming it; for in that case, if the pledge be lost, he is responsible for the value, since by such obstruction he becomes an *usurper*, as he no longer possesses a power of obstruction.)—In the same manner, if a woman take a pledge from her husband in security of her stipulated dower, and afterwards exempt him from the payment of it, or apostatize from the faith before consummation, and the pledge be then destroyed in her hands, she is not responsible for it, as the dower (like the debt) was remitted.

having acquitted the pawner of his debt.

IF a pawnee receive payment of his debt, either from the pawner or from an unconcerned person, in a gratuitous manner, and the pledge be afterwards destroyed in his possession, his debt is in conse-

If the pledge be destroyed with him after he has received pay-

M m 2

quence

ment of his debt, he must return what he has received, and the debt stands liquidated;

quence extinguished, and it is incumbent on him to restore what he had received to the person from whom he received it, whether the pawner or any other; for the seizure of the pawnee is equivalent to a receipt of payment in case of the loss of the pledge; and in the present instance, upon the pledge being destroyed, the pawnee is accounted to have received payment from the time he was first seized of it; and as he is not entitled, after that, to a *second* discharge, and the payment he had received as above then becomes such in effect, it must therefore be refunded.—In short, the discharge of the pawnee's claim, whilst he remains seized of the pawn, does not take place, but continues *suspended* until he deliver it to the pawner; and such being the case, the pawner is not therefore, during that time, held to be acquitted of the debt;—and upon the pledge being afterwards destroyed in the hands of the pawnee, his possession of it under such a circumstance is, in effect, a *receipt of payment*, and the other payment received whilst he was in possession of the pledge is annulled and done away, for otherwise a *repetition* of discharge would be induced;—for which reason he must refund the money he received in payment,—and also for *this* reason, that if he were not to refund it the intent of the pawner would be defeated.

and so likewise, if he compound the debt;

If a pawnee purchase some specific article from the pawner in lieu of his debt, or *compound* the debt with him for some specific article; and the pawn be afterwards lost in his possession, he is still responsible, and may therefore be compelled to restore the article which he had either received in purchase or composition; for the seizure of that article, in either case, is equivalent to an acceptance of payment; and consequently, if he do not refund it, a double receipt of payment is induced, as mentioned in the preceding example.

or if the pawner (with his concurrence) trans-

If a pawner transfer the debt which he owes the pawnee upon another person, (such as *Zeyd*, for instance,) who agrees to pay the same, and the pawnee, having assented to such transfer, acquit the pawner

pawner of the debt, and the pledge be afterwards destroyed in the pawnee's hands, the transfer is thereby rendered ineffectual, and the claim of the pawnee is annihilated; for although, in consequence of the transfer, the transferrer [the pawner] be acquitted of any further concern in the matter, yet this acquittance is the same as an actual payment, inasmuch as the sum, the payment of which he had transferred upon the other person, is ultimately disbursed by him, he having so transferred it in consequence of his having a claim upon the transferee for a like sum, whence the payment is made from him *in effect*;—or, if that person was *not* indebted to him, still the pawner must afterwards repay whatever sum he may have disbursed in consequence of the transfer, as in that case he acted in the capacity of an agent on his behalf.

If a person pawn any thing into the hands of another, and both parties afterwards concur in saying that no debt had ever subsisted between them, and the pledge be then destroyed in the hands of the pawnee, it is answered by the debt; in other words, the debt in security of which the thing had been pawned is extinguished;—for there is still a probability of the debt being established by the parties at some future period concurring and agreeing that it *did* exist; whence it is possible that the debt may be claimed,—a circumstance which cannot happen in a case of *acquittal* of debt.

If the pledge be lost after the parties agreeing that no debt had existed, it stands as a discharge of the supposed debt.

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HEDAYA.



## H E D A R A.

## B O O K XLIX.

## OF JANĀTAT, or OFFENCES against the PERSON.

Definition of  
*Janāyat*.

*JANĀTAT*, in the language of the LAW, is a term expressive of any prohibited act committed either upon the *person* or *property*:—in the practice of lawyers it signifies that prohibited act committed upon the *person* \*, which is called *murder*, or upon a part of the body, which is termed *wounding* or *maiming*.

\* Arab. *Zāt*, signifying the body connected with the soul; in opposition to *Badn*, which means simply the *material* body. The translator renders it *person* or *life*, as best suits the context.

Chap.

- Chap. I. Introductory.  
 Chap. II. Of what occasions Retaliation.  
 Chap. III. Of Retaliation in Matters short of *Life*.  
 Chap. IV. Of Evidence in Cases of *Murder*.  
 Chap. V. Of the Circumstances under which *Murder* takes place.

CHAP. I.

THE homicide of which the LAW takes cognizance is of five kinds; Homicide is of five descriptions.  
 I. *Katl-amd*, or wilful murder; II. *Shàbbáb-amd*\*, or manslaughter;  
 III. *Katl-khotá*, or homicide by misadventure; IV. *Katl-kâyem-mokàm-bá-Khotá*, or homicide of the same nature as that by misadventure;  
 and V. *Katl-ba-Sibbab*, or homicide by an intermediate cause.

KATL-AMD, or wilful murder, is where the perpetrator maliciously kills a man with a weapon, or something that serves for a weapon, such as a club, a sharp stone, or fire; because *amd* means *intentionally*, or *wilfully*; and as the intention is a thing concealed, which we cannot discover but by inference from something affording an argument of it, and the use of an *instrument* of murder does afford such I. Wilful murder;

\* This is a technical phrase signifying, literally, "the semblance of wilful:"—the translator expresses it by the term *manslaughter*, on the authority of SALE, (see his Introductory Discourse, sect. VI.) and also, as being the most analogous term in our language.

argument,

argument, it may be concluded, where such an instrument is used by the slayer, that murder was his intention.

which is *criminal*, and subjects the offender to retaliation.

IF a person commit wilful murder, two points are established. I. that the murderer is a *criminal*; because it is said in the KORAN; “WHOEVER SLAYETH A BELIEVER, HIS REWARD IS HELL;” and the same is repeatedly mentioned in the traditions; and all authorities, moreover, concur in this point. II. that the murderer is—liable to retaliation; because the KORAN says, “IT IS INCUMBENT ON YOU TO EXECUTE RETALIATION UPON MURDERERS,”—by whom is to be understood persons guilty of *wilful murder*, as it is said in the traditions, “*Wilful murder requires retaliation.*”—An offence is, moreover, rendered complete by the *intention*, and complete punishment (understood by retaliation) is incurred where that exists, but otherwise not. In short, retaliation is incurred in a case of wilful murder, except where the heirs\* of the murdered person either forgive or compound the offence, retaliation being their right. It is proper, also, to observe, that retaliation is the appointed penalty in this instance; and the heir is not at liberty to commute it for a fine, but with the consent of the murderer. This is likewise one opinion of *Shafei*. He however says, that the heir is at liberty to remit the retaliation, and exact a sum in lieu of it, without the murderer’s consent; for as this occasions his release from destruction, it is consequently lawful independant of his will. Another opinion of his is, that one of two things is incurred, without any particular appointment or specification of either,—namely, retaliation, or fine; and that this determination rests with the heir,—(that is, one or other

\* Arab. *Awleya*, plural of *Wallee*. This term has a multitude of meanings, as has been already repeatedly observed. In the present instance it signifies the *next of kin*, or other persons entitled to exact retaliation, as is more fully explained in treating of the *levying of fines*. The term *heir*, although not strictly literal, is adopted as being the most analogous for the convenience of the English reader.—*Wallee-ad-dam* is for the same reason rendered *avenger of blood*.

becomes

becomes determined, according to his choice;) because the LAW endows the individual with a right for the reparation of his injuries; and the injury, in the present instance, is repaired either way. The arguments of our doctors in support of the former opinion are twofold. FIRST, what has been already quoted from the KORAN and the traditions.—SECONDLY, property is incapable of being a recompence for murder, since between *property* and a *man* there is no equality or comparison,—whereas retaliation possesses this capacity, because of the equality between the persons of the murdered and the murderer;—and it is, moreover, advantageous to the living, since by the execution of a murderer men are deterred from committing this offence.

THERE is no *expiation*, in a case of wilful murder, according to our doctors. *Shafëi* maintains that expiation also is incumbent\*; for as the necessity for expiation is still more urgent in a case of *wilful murder* than in a case of homicide by misadventure, it follows that in the former instance it is incumbent *a fortiori*. The argument of our doctors is that wilful murder is a peculiarly heinous offence; and as expiation bears the property of an act of piety, the performance of it is not to be annexed to an offence of that description. Expiation, moreover, is appointed by the LAW in atonement for the *smaller* offence, namely, homicide by misadventure; and it does not hence follow that it is appointed in atonement for the *greater* offence also, namely, *wilful murder*.

ONE effect of wilful murder is that the murderer is excluded from being heir to the murdered person; for, in the traditions, it is said, "There is no inheritance to the murderer." and excludes him from inheritance.

\* That is, besides the *fine*,—supposing retaliation to be remitted in lieu of a fine; for where retaliation is executed, expiation is out of the question.

II. *Man-slaughter*;

SHABBAH-AMD, or manslaughter, according to *Haneefa*, is where the perpetrator strikes a man with something which is neither a weapon nor serves as such. The two disciples and *Shafei* maintain that if the stroke be given with a large stone, or a club, the act amounts to wilful murder. *Shabbah-amd*, or manslaughter, on the contrary, (according to the two disciples,) is where a person strikes another with something of a nature not likely to produce death, such as a *small stick*. For as, in this case, the property of *wilful*\*, in the act, is defective, (inasmuch as the perpetrator here uses an instrument not of a mortal kind, the intention being something else than death, namely, *instruction*, or so forth,) it follows that killing a person with such an instrument is merely a *semblance* of wilful murder;—whereas the property of *wilful* is not defective in case of a man striking another with an instrument of a nature to produce instant death, such as a *great stone*,—for here the intention can only be to kill, as well as with a scimitar;—this, therefore, is wilful murder, and occasions retaliation. The argument adduced by *Haneefa* is a saying of the prophet, “*Killing with a rod or stick is not MURDER, but only MANSLAUGHTER†, and the fine for it is one hundred camels.*” Another argument is, that as the instruments in question are not commonly used with a view to *kill*, (whence it is that the property of *wilful* is defective therein, considering the instrument used,) killing, therefore, with such instruments amounts only to manslaughter, in the same manner as killing with a rod or a small stick.

which is also criminal; requires expia-

MANSLAUGHTER is sinful, the perpetrator having struck intentionally, and killed, although without design; and it requires expia-

\* The term *amd* [wilful] is used, in the *Mussulman* law, in a sense analogous to the *malicium* of the *Roman* law.

† Literally, “*is merely SHABBAH-AMD;*” in other words, “*is merely a SEMBLANCE of WILFUL [murder.]*” Where technical terms, of a nature not to bear translation, occur so frequently, some liberties must necessarily be taken with the text.

tion, because of the semblance it bears to homicide by misadventure. An heavy fine is also due from the *Akilas* of the slayer, because of the analogy this offence bears to homicide by misadventure; for it is a rule that in all cases where the fine\* is due for bloodshed at the first, and not on account of any supervenient or involved matter, it falls upon the *Akilas*, as being connected with homicide by misadventure. The restriction, in this particular, to "*at the first*," is in order to distinguish this from the fine incurred on account of some other matter, and not on account purely of the *bloodshed*;—as where, for instance, a father wilfully kills his son, in which case the fine falls immediately upon the murderer, and not upon his *Akilas*,—for here retaliation is incurred at the first, prior to fine, but is commuted for a fine out of reverence to the parent;—or where one of the heirs of a person wilfully murdered forgives the offence, in which case the other heirs are entitled to the fine;—or where the heirs of a person wilfully murdered enter into a composition for the fine;—for in all these instances the fine is due from the property of the murderer, and does not fall upon his *Akilas*, as not having been due *at the first*.

tion; subjects the *Akilas* of the murderer to the payment of a heavy fine,

IN consequence of manslaughter an heavy fine is due from the *Akilas* [of the perpetrator,] payable within three years; because it is recorded of *Omar* that he thus ordained in such cases. (The meaning of an *heavy* fine shall be presently made appear.)

(payable within three years;)

ONE effect of manslaughter is that it excludes the slayer from inheriting to the slain, this being the proper recompence of bloodshed. The *doubt*, moreover, which obtains in this species of bloodshed occasions a remission of retaliation, but does not prevent an exclusion from inheritance.

and excludes the man-slayer from inheritance.

\* Always meaning (throughout this book) the *Deyit*, or *fine of blood*.

III. *Homicide by misadventure*

THE error which occasions *Katl Khota*, or *homicide by misadventure*, is of two kinds; I. error in the *intention*; II. error in the *act*. Error in the *act* is where a person intends a particular act, and another act is thereby occasioned;—as where, for instance, a person shoots an arrow at a *mark*, and it hits a *man*.—Error in the *intention*, on the other hand, is where the mistake exists, not in the *act*, but with respect to the *subject*;—as where, for instance, a person shoots an arrow at a *man*, supposing him to be *game*; or at a *Mussulman*, under the supposition of his being a *hostile infidel*;—for here the person who shoots intends to hit the object, but errs in his intention, as not knowing what that object is.

which requires expiation; the offender is liable to a fine (payable in three years;)

HOMICIDE BY MISADVENTURE requires two things; expiation, (performed by emancipating a *Mussulman* slave, or else fasting for two months successively,) and the payment of a fine from the *Akila* [of the slayer] within three years; because God has said, in the KORAN, "WHOSO KILLETH A BELIEVER BY MISTAKE, (the penalty of it is) THE FREEING OF A BELIEVER, AND A FINE TO THE FAMILY (of the slain;)"—and the fine is payable within *three years*, because of the determination of Omar, as before mentioned.

is criminal in a certain degree;

HOMICIDE BY MISADVENTURE does not bear the criminality of wilful bloodshed. Still, however, it is not altogether exempt from criminality; for as the slayer neglected caution; and acted hastily in shooting his arrow, he is criminal so far as *having neglected caution*. Besides, if the act were not criminal, expiation for it would not have been ordained, as expiation is ordained in atonement for crimes.

and excludes the offender from inheritance.

HOMICIDE BY MISADVENTURE occasions the slayer's exclusion from inheriting to the slain; because it is an offence for which exclusion from inheritance is the due recompence.

(A blow with an intention

If a person strike at any part of another, with intention to wound him,

him, and hit another part, and the person struck die in consequence of the wound, retaliation is incurred; because this is not *homicide by misadventure*; for here the bloodshed is a consequence of an intention against a certain part; and all the parts of the body are as a single subject.

to wound only, if it produce death, subjects to the penalties of wilful murder.)

**HOMICIDE** of the *fourth* description (namely, that which is of the *same nature* as homicide by misadventure\*) is where, for instance, a person walking in his sleep falls upon another so as to kill him by such fall; and it is subject to the same rules with homicide by misadventure.

IV. Homicide of the SAME NATURE as by misadventure.

**HOMICIDE BY AN INTERMEDIATE CAUSE** is where, for instance, a person digs a well, or sets up a stone, in ground which does not belong to him, and another falls into the well, or over the stone, and dies;—in consequence of which a fine is due from the *Akila*; because the digging of the well, or placing the stone, was the occasion of the deceased's destruction; and as the person who dug the one or set up the other was guilty of a transgression in so doing, the case is in fact the same as if he had himself thrown the deceased into the well or against the stone. A fine is therefore incumbent in this instance.

V. Homicide by an intermediate cause, which subjects the offender's *Akila* to a fine,

incurred as homicide.

but does not require expiation, nor exclude from inheritance,

**EXPIATION** is not incumbent in this species of *homicide*, nor is the guilty person excluded from inheriting [to the person killed.] *Shafii* alleges that *homicide by an intermediate cause* is connected with *homicide by misadventure*, with respect to all its effects, the lawgiver having accounted the guilty person, in this instance, to be equally a *shedder of blood*. The argument of our doctors is that as, in this case, the bloodshed has not *actually* proceeded from the offender, the fact is therefore connected with homicide merely with respect to a *compensation*, continuing, so far as concerns other matters, subject to its own rules.

\* This distinction might perhaps be with propriety rendered *accidental homicide*.

THE



although the person from whom it originates be an offender.

THE digger of the well, or fetter-up of the stone\*, is an offender because of these acts,—that is, because of digging the well, or so forth, *in land not his own property*, and not because of the death thereby occasioned,—according to the opinions of the learned. Homicide by an intermediate cause, therefore, does not require expiation; nor does it exclude from inheritance, (as has been already mentioned,) because such exclusion is a penalty annexed to the actual *offence of bloodshed*, which does not here exist.

General rule in offences short of life.

WHATEVER has the *semblance* merely of a wilful act, where life is affected, amounts to *wilful* in any thing *short* of life; because the destruction of life bears a different construction according to the instrument by means of which such destruction is produced;—whereas the destruction of a *limb* or *member* does not bear any difference of construction from that circumstance; for by *bloodshed* is understood an act by which the vital principle is extinguished; and the vital principle is not a matter of a palpable nature,—nor can the intention of destroying it be discovered but from the use of some mortal weapon; whereas a *limb* or *member* being a palpable thing, the instrument used in destroying it does not occasion any difference in the construction of the act by which it is destroyed. Besides, if an instrument of manslaughter (such as a *rod*) be used with an intention to kill, the act is *murder*,—whereas if it be used merely with a view to *correction*, and produce death, it is only *manslaughter*; but these distinctions do not exist in any matter short of life, since in the same manner as the destruction of a member may be intended by the use of a weapon, so may it likewise by the use of any thing else; for as an eye (for instance) may be put out by a weapon, so likewise may it by a small rod; and consequently the act is equally *wilful* in either instance.

\* In the public highway, which may be an intermediate cause of homicide, by occasioning the death of a passenger. (This subject will be discussed at large in the next book, under the head of *Nuisances*.)

## CHAP. II.

## Of what occasions Retaliation.

RETALIATION is incurred by the killing of a person whose blood is under continual protection \*, where the perpetrator slays him *wilfully*. The reason for stipulating that the act be *wilful* has been already explained; and it is also a condition that the person slain be one whose blood is under *continual* protection, in order that the doubt with respect to the neutrality of his blood may be removed, and an equality certified [between the slayer and the slain,] as equality is the point upon which retaliation turns.

Retaliation is incurred by the wilful murder of any person of protected blood.

A FREEMAN is slain for a freeman;—and also for a slave the property of another, the argument for retaliation being universal, as was before explained. *Shafëi* maintains that a freeman is not to be slain for a slave; because GOD has said, in the KORAN, “THE FREE SHALL DIE FOR THE FREE, AND THE SERVANT FOR THE SERVANT;” and also, because retaliation rests upon equality, which does not exist between a freeman and a slave,—whence it is that the limb of a freeman is not struck off for the limb of a slave:—in opposition to a *slave for a slave*, as these are on a perfect equality; and contrary, also, to the case of slaying a slave for a freeman, for here the defect is on the part of the slayer, which is no obstacle to retaliation; as where, for instance, a paralytic person murders one in perfect

A freeman is slain for a slave the property of another;

† Such as a *Mussulman* or a *Zimmet*: in opposition to aliens, who have only an *occasional* and *temporary* protection.

health,

health, in which case he is slain in return. The argument of our doctors is, that retaliation rests merely upon equality in point of protection to the blood; (in other words, it depends upon the blood of *both* parties being in perpetual protection, and never in a neutral state;) and accordingly a person in health is put to death for a valetudinarian, an adult for an infant, and a maniac for one in his perfect senses;—because both parties are upon a footing in point of protection. Now this protection is a consequence either of religion or country; and as a slave and a freeman are both equally in these respects entitled to it, a freeman may therefore be put to death for a slave.

and a *Mussulman* for a *Zimnee*.

A MUSSULMAN is put to death for a *Zimnee*. *Shafëi* maintains that a *Mussulman* is not to be put to death for a *Zimnee*; because the prophet has said, “*A MUSSULMAN is not to suffer death for an infidel;*” and also, because there is not a perfect equality between the parties at the time of the offence, God having said, “*Infidels are not the equals of believers;*” and also, because as infidelity puts the blood out of protection, there is in this instance a doubt concerning its neutrality, preventive of retaliation. The arguments of our doctors upon this point are twofold.—FIRST, it is recorded of the prophet, that he once slew a *Mussulman* for a *Zimnee*.—SECONDLY, an equality must necessarily be established on the part of the *Zimnee* with respect to protection of blood, when we consider the circumstance of country, and the duties of life; for if his blood were not protected, it would be impossible for him to discharge the various duties required of him as a member of the community. With respect, moreover, to what is advanced by *Shafëi*, it may be replied, that by the infidelity which puts the blood out of protection is to be understood the infidelity of an *hostile* unbeliever, as *those* are the infidels who hold enmity with *Mussulmans*, and not *Zimnee* infidels. The rule, moreover, of retaliating upon a *Zimnee* for a *Zimnee* affords an argument that the infidelity of a *Zimnee* does not occasion any doubt with regard to the protection of his blood, since if this were a matter of doubt, a

*Zimnee* would not be slain for a *Zimnee*. Besides, by the term *infidels* (in the saying of the prophet adduced by *Shaf'î*) must be understood *Mooslâmins*, or *protected* infidels, as appears from what the prophet further said, (in the same tradition,) "*A ZIMMER is not to be slain for an INFIDEL,*" (meaning a *Mooslâmin*.)

A MUSSULMAN is not to be slain for a *Mooslâmin*, as the blood of a *Mooslâmin* is not in a continual state of protection,—and his infidelity is, moreover, an occasion of hostility, since a *Mooslâmin* still entertains an intention of returning to his own [an hostile] country. Neither is a *Zimnee* to be slain for a *Mooslâmin*, because of the tradition of the prophet before noticed.

A Mussulman is not slain for a *Mooslâmin*;

ANALOGY suggests that a *Mooslâmin* is to be slain for a *Mooslâmin*, both being upon a footing. The benevolence of the law, however, determines that one *Mooslâmin* is not to be slain for another; because here the infidelity which occasions *enmity* exists with respect to the parties; and as that puts the blood out of protection, there is therefore a doubt with respect to its being protected sufficiently to prevent retaliation.

nor one *Mooslâmin* for another.

A MAN is slain for a woman, an adult for an infant, and a sound person for one who is blind, infirm, dismembered, (that is, deprived of an *eye* or a *limb*,) lame, or insane; because the argument of retaliation is universal; and if regard were paid to a disparity in those particulars, as well as in point of protection to the blood, retaliation would be in a great measure prevented, and contention and bloodshed would consequently prevail among mankind.

A man is slain for a woman; and the sound for the unsound.

A FATHER is not to be slain for his child; because the prophet has said, "*Retaliation must not be executed upon the parent for his offspring*;" and also, because, as the parent is the efficient cause of

The parent is not slain for the child,

his child's existence, it is not proper that the child should require or be the occasion of his death;—whence it is that a son is forbidden to shoot at his father when in the army of an enemy, or to throw a stone at him when suffering lapidation for whoredom. All the ancestors, whatever be their character or degree, are included in this rule; and so likewise the mother, grandmothers maternal or paternal, and all other *female* ancestors, however remote; because of the argument for retaliation being universal, as was above observed.

but the child  
is slain for the  
parent.

A CHILD is slain for the parent, as the reason for retaliation here exists, and there is no reason why it should be remitted.

A master is  
not slain for  
his own or his  
child's slave.

A MASTER is not slain for his slave, nor for his *Modabbir* or *Modatib*, nor for the slave of his child;—because, if retaliation were due in those instances, it must be so at the requisition either of the master himself, or of his child\*, the one of which is absurd, and the other inadmissible.

nor for a slave  
in which he  
has a share.

If one of two partners in a slave kill such slave, retaliation is not incurred; because it fails in the proportion of this partner's right in the slave, the avenger of the blood being, with respect to that part, the murderer himself; and as it thus fails *in part*, it must necessarily fail *in toto*, since retaliation does not admit of being inflicted *in part* only.

Retaliation  
inherited  
against a pa-  
rent drops.

If a person inherit the right of retaliating upon his parent, the retaliation fails, and is remitted, because of the reverence due to paternity.

\* The master of a slave, being his *Mawla*, is the only person entitled to demand satisfaction for his blood.

## RETALIATION

RETALIATION is not to be executed but with some mortal weapon \*. *Shafai* maintains that we must execute upon the murderer the very act he committed upon the murdered, provided it be such as is sanctioned by the LAW: if, therefore, this be done, and the murderer in consequence die, it is well; but if not, his throat must then be cut with a scymitar. For instance;—if a person wilfully strike off the hand of another, and the dismembered person die in consequence of the wound, the hand of the murderer must first be cut off in retaliation, and if he die within the same time after as the deceased, it is well; but if not, he must then be put to death. If, on the contrary, a person produce the death of another by some act not sanctioned in the LAW, (such as by laying hold of the hands, and pouring poison down the throat,—or by coition with an immature infant,) retaliation is to be executed by putting to death; and this according to all authorities.—The argument advanced by *Shafai*, in support of his opinion as above, is that retaliation rests upon a perfect equality in all particulars, which requires that there be inflicted on the murderer the very same act that he committed upon the deceased. The arguments adduced by our doctors in support of the contrary opinion are twofold;—FIRST, a saying of the prophet, “*There is no retaliation but with a scymitar,*” —(meaning a sword, as is understood by all the companions.) SECONDLY, according to what *Shafai* advances, it follows that, where the exacter of retaliation executes upon the murderer the same act that he had committed on the deceased, and the end is not thereby answered, and he then puts him to death, he takes more than he is entitled to, a thing which must be carefully avoided; as where, for instance, a person wilfully breaks a bone of another, in which case retaliation in any shape does not follow, because of the apprehension of the exacter taking more than his right; an apprehension which applies equally in the present instance.

It must be executed with a mortal weapon.

\* That is, with a sharp instrument, such as is proper to inflict a wound.

Cases of retaliation for the murder of a *Mokâtib*,

If a person wilfully murder a *Mokâtib*, who has no heir but his master, and leaves effects sufficient to discharge his ransom, the master is entitled to exact retaliation, according to the two *Elders*.—*Mohammed* says there is no retaliation in this instance; because here the existence of the ground or cause for taking retaliation is dubious, and unascertained; for the cause thereof is *Willa*, supposing the *Mokâtib* to have died *free*, or, right of property in his person, supposing him to have died a *slave*,—(as the companions have differed concerning the point whether a *Mokâtib*, under the circumstances above described, died a *slave* or *free*, some deciding one way, and some another; )—and the cause for taking retaliation being thus doubtful, and unknown, it cannot be exacted.—The argument of the two *Elders* is that the right of taking retaliation undoubtedly appertains to the master, for two reasons, namely, *Willa*, and right of property in the person; and as the effect of each is the same, (namely, the taking of retaliation,) the difference in the causes cannot occasion either a dispute, or a difference in the effect; neither is any regard paid to such a difference.—The difference above urged, therefore, does not prevent retaliation.

If a person wilfully murder a *Mokâtib*, who leaves effects sufficient to discharge his ransom, and has other heirs besides the master, retaliation is not incurred on behalf either of the master or his heirs, although both should unite in demanding it; because here the person entitled [to retaliation] is dubious and unascertained, the *master* being the entitled person, if the *Mokâtib* died a *slave*, and the *heirs*, if he died *free*, as before mentioned.—It is different in the preceding case, for there the person entitled is specific and determinate, namely the *master*.

If a person murder a *Mokâtib*, who does not leave effects sufficient to discharge his ransom, retaliation is incurred on behalf of the master,

master, according to all; because here the *Mokâtib* undoubtedly dies a *slave*, as the contract of *Kitâbat* is broken from his inability to discharge the ransom. It is otherwise with respect to a slave emancipated in part:—in other words,—if one of two partners in a slave emancipate his share, and emancipatory labour be, consequently, due from the slave for half his value, and a person kill him before he has discharged it, he leaving no effects wherewith to make satisfaction for such labour,—still retaliation is not incurred on behalf of the emancipating partner; because, as the partial manumission is not dissolved or broken by the slave's inability to perform the labour, a right in the whole of him does not appertain to the master.

If a pawned slave be murdered whilst in the possession of the pawnholder, retaliation is not to be executed until the pawn and pawnholder unite in demanding it;—because, as the pawnholder is not the slave's *master*, he is consequently not entitled to the retaliation; and if the pawn alone exact the retaliation, the right of the pawnholder, in the debt due to him, is destroyed.—It is therefore determined that both must unite in taking the retaliation, as in such case the pawnholder's right is done away by his own consent.

or of a pawned slave.

If a person be slain whose heir [*Wallee*] is an infant or an idiot, it belongs to the father of the infant or idiot to execute retaliation upon the murderer; because the taking of retaliation is the right of him who is endowed with the guardianship of the person entitled to it, retaliation having been ordained on account of a matter in which guardianship is interested, namely, *satisfaction to the mind*;—and hence the infant's or idiot's right to retaliation appertains to the father, in the same manner as the right of contracting them in marriage.—It is otherwise, however, with respect to a *brother* or *uncle*, although they also be endowed with the right of contracting the infant or idiot in marriage; for as the father's tenderness is *complete*, inasmuch that he regards the interest of his child in preference even to *his own*, his exacting

Retaliation appertaining to an infant or idiot may be executed by the father,



acting the retaliation on account of his child is the same as the child himself exacting it; which is not the case with a brother or uncle, whose tenderness is of a defective nature, they preferring their own interest to that of their brother or nephew,—whence in committing the right to them, the interest of the infant or idiot is not to a certainty pursued.—Besides, the executing of retaliation is an act which cannot be afterwards undone; in opposition to marriage, which may be undone.—They, therefore, are not empowered to take retaliation.

who is also at liberty to commute it for a fine.

THE father of an infant or idiot is empowered to compound retaliation for a fine, on their behalf, this being advantageous to them:—but he is not empowered to remit the retaliation gratuitously, as this would be destructive of their right.

IF a person wilfully strike off the hand of an infant or idiot, the father of such infant or idiot may either strike off the hand of the offender, in retaliation, or compound the matter for a fine,—for the reasons already mentioned.

The power, in this particular, of guardians appointed by will.

A GUARDIAN appointed by will\* is the same as a father, with respect to all the points above mentioned,—except retaliation by slaying; for he is not entitled to put the murderer to death, as he has no power over his life, and the taking of retaliation is an effect of power over life.—From this (it is to be observed) we may infer that the guardian in question is at liberty to enter into compositions for a fine in lieu of life, and also to take retaliation in all matters *short* of life, nothing being excepted beyond actual *slaying*.—It is indeed asserted, in the treatise on *Compositions*, that an appointed guardian is not at liberty to compound life for property; for as this is an act with respect to life, being an acceptance of a return for life, such

\* Arab. *Wafes*.—It also signifies (more literally) an *executor*.—It is here used in opposition to a *natural* guardian.

composition is equivalent to taking retaliation;—and as the one is not allowed to an appointed guardian, so neither is the other.—The reason, however, for what we have mentioned above, is that the end, in composition, is *property*, which is rendered obligatory by an engagement with an appointed guardian, in the same manner as with a father. It is otherwise in retaliation; for the end, in that, is purely revenge, and satisfaction to the mind, which are restricted also to the father, as he, because of his near relation, and tender affection, is the substitute of his child with respect to them.—Lawyers have observed that, according to analogy, an appointed guardian is not empowered to exact a retaliation *short* of life, any more than a retaliation which extends to life; because the end, in both, is the revenge and satisfaction already mentioned:—but that, according to a more favourable construction of the law, he is so empowered; because the parts of the body are equivalent to *property*, as having been, like property, created for the support and preservation of life; and hence the exacting of a retaliation short of life is merely equivalent to an act with respect to property.

If a person murdered leave heirs, some infants, and some adults, according to *Hancefa*, the adult heirs are entitled to put the murderer to death.—The two disciples, on the contrary, maintain that they are not entitled to slay the murderer until such time as the infant heirs attain maturity; because retaliation is a right equally participated in by all the heirs; and it is impossible for the adult heirs to take their right, (namely, *part* of the retaliation) as retaliation is indivisible; and if they take it *in toto*, the right of the infant heirs is destroyed.—A delay is therefore indispensable until the infant heirs become of age;—in the same manner as where a right of retaliation is possessed by two men, and one of them is absent,—in which case the one who is present cannot exact the retaliation until the absentee be also present;—or, as where a slave held in partnership between an infant and an adult is murdered,—in which case the adult cannot take retaliation

Case of a murdered person leaving several heirs, some infants, and some adults.

retaliation until the infant have attained maturity.—The argument of *Haneefa* is that retaliation is not divided; for retaliation is established on behalf of relationship, which is not of a divisible nature, since if a man have two brothers (for instance,) a complete relationship belongs to each,—not one half to one and one half to the other; and there is, moreover, no room, for the present, to apprehend that the infant might grant the murderer a pardon, since to that he is incompetent during his minority.—The right of taking retaliation is therefore established to each *in toto*, in this way, that each is (as it were) distinct and separate,—in the same manner as guardians in marriage, each of whom possesses a power to contract the ward in marriage independent of the others, and as if no other existed.—It is otherwise where retaliation is divided between two adults, one of whom is absent;—for here exists the apprehension of a present pardon from the absentee.—With respect to the case of two partners in a slave, adduced by the two disciples, *Haneefa* does not admit it as any objection, since (according to him) in this case also the adult master is entitled to exact the retaliation.

Retaliation is incurred from killing by a blow with the *iron* of a spade, &c. but not with the *shaft*.

IF a person strike another with a *spade*, or *shovel*, and the person struck die in consequence, and the blow have been given with the *iron* part of such spade or shovel, the murderer is liable to be put to death.—If, on the contrary, the blow have been given with the *wooden* part [the handle or shaft], he is responsible for a fine; because he has slain a person of protected blood; and as retaliation is in such case forbidden, the fine is due, in order that the blood may not be shed without penalty.—Our author here remarks that the murderer, in the former instance, is liable to be put to death only when he struck with the *edge* of the iron part, as by this alone a *wound* (which demands retaliation) can be inflicted; and that if he have struck with the *back* of the instrument, not with the *edge*, there is a difference of opinion among our doctors,—the two disciples holding that in this instance also he is liable to suffer death, as regard is paid solely to the use

use of an instrument of murder, which here exists,—and *Haneefa*, on the contrary, maintaining that he is not liable to death, as retaliation is not incurred unless a *wound* be inflicted.—This last is the better opinion, as shall be presently made appear.

IF a person immerse another, whether an infant or an adult, into a water whence it is impossible for him to escape by swimming, (as the *sea*, for instance,) retaliation is not incurred, according to *Haneefa*.—The two disciples, on the contrary, maintain that retaliation is incurred; and such also is the opinion of *Shafeï*; with this difference, however, that according to the two disciples it is inflicted with a weapon, whereas according to *Shafeï* the murderer is to be drowned.—The arguments of those doctors, in support of their opinion upon this point, are twofold.—FIRST, a saying of the Prophet, “*If any person drown another, I shall drown him in return.*” SECONDLY, *water* is an instrument of murder, the same as *fire*, wherefore the use of it is an argument of *wilfulness* in the act; and as there is no doubt with respect to the protection of blood of the slain, retaliation is consequently incurred by him.—The arguments of *Haneefa* are also twofold.—FIRST, water is analogous to a small stick or rod, as it is seldom or never used in murder. Now it is said, in the traditions, that death produced by a *rod* is merely *manslaughter*; and as, in that, a fine merely is incurred, so here likewise. SECONDLY, retaliation requires the observance of a perfect equality: but between *drowning* and *wounding* there is no equality, the former being short of the latter with regard to damaging the body.—As, therefore, the infliction of retaliation is in this cause impossible, a fine is consequently due from the *Akila*s of the slayer.—With respect, moreover, to the saying of the prophet, adduced by the two disciples, the drowning there treated of is to be regarded merely in the light of a *punishment*, and not as *retaliation*; for if the prophet had meant retaliation, he would have referred the execution of it to the relations of the drowned person, and not to [himself] the magistrate.

It is not incurred by drowning any person.

It is incurred by [maliciously] wounding a person, who dies in consequence.

If a person wound another, so as to disable and render him perpetually bedridden until death, retaliation is incurred by the person who inflicted the wound; for as a cause of murder here exists, and nothing occurs to do it away, the death must be referred to such cause, and retaliation is incurred in consequence.

It is not incurred by mistakenly slaying a *Mussulman* in battle.

If an army of *Mussulmans* engage an army of infidels, and they mingle together, and a *Mussulman* kill another *Mussulman*, on the supposition of his being an infidel, he is not liable to retaliation, but must perform an expiation, and pay a fine; because this is *homicide by misadventure*; in which expiation and fine are due, but not retaliation,—as has been already explained.

Case of death produced by a combination of various causes.

If a person hit himself upon the *head*; and *another* person also hit him upon the same part, and a wild beast tear him, and a snake bite him, and he die in consequence of all these, the person who struck him is liable for one third of the fine of blood; because the acts of the wild beast and snake are of the same nature, and incur no penalty either in this world or the next; and as the act committed by the deceased upon himself is also of no account in this world, (notwithstanding it be of account in the world to come, as the person in question is therein universally admitted to be an offender,) this constitutes another species; and as, again, the act of the other person is of account both in this world and in the world to come, it therefore constitutes a *third* species.—Now, the deceased having perished in consequence of these three different species of acts, he may be said to have perished by *three several acts*; and as the act of the other person was one of these three, he is consequently responsible for one third of the fine.

SECTION.

## SECTION.

IF any person draw a sword upon a *Mussulman*, he [the *Mussulman*] is at liberty to kill him in self-defence; because the prophet has said, “*He who draws a sword upon a MUSSULMAN renders his blood liable to be shed with impunity*;” and also, because a person who thus draws a sword is a rebel, and guilty of sedition; and it is lawful to slay such, God having said, in the KORAN, “SLAY THOSE WHO ARE GUILTY OF SEDITION, TO THE END THAT IT MAY BE PREVENTED.”—Besides, it is indispensably requisite that a man repel murder from himself; and as, in the present instance, there is no method of effecting this but by slaying the person, it is consequently lawful so to do. If, however, it be possible to effect the self-defence without slaying the person, it is not lawful to slay him.

A man may  
kill another  
in self-defence.

It is written in the *Jama Sagbeer*, that if a person strike at another with a sword, during either night or day, or lift a club against another in the night in a city, or in the day-time in the highway out of the city; and the person so threatened kill him who thus strikes with the sword, or lifts the club, nothing is incurred; because, as striking with a sword affords no room for delay or deliberation, it is in this case necessary to kill the person in order to repel him; and although, in the case of a *club*, there be more room for deliberation, yet in the night-time assistance cannot be obtained, and hence the person threatened is in a manner *forced*, in repelling the other's attack, to kill him; (and so likewise where the attack is made during the day-time in the highway, as there assistance cannot readily be obtained.) Where, therefore, a person thus slays another, the blood of the slain is of no account.

Distinctions  
in this particular.

A fine is due for slaying an infant or lunatic in self-defence.

If a lunatic draw a sword upon a person, and the person slay him, the fine of blood is due from his property, and does not fall upon his *Akila*. *Shafei* maintains that nothing whatever is incurred in this instance.—In the same manner also, if an *infant* draw a sword and make an attack upon a person,—or if an *animal* attack any one, and the person so attacked slay the infant, or the animal, a *fine* is due on account of the infant, or the *value* on account of the animal, according to *Haneefa*, but not according to *Shafei*. The arguments of *Shafei* upon this point are twofold. FIRST, as the person attacked slew the infant or lunatic in *self-defence*, they are therefore accounted the same as a sane person or an adult. SECONDLY, the person attacked slew the infant or lunatic because of their act furnishing him with a reason for so doing. He is therefore in the same predicament with a person acting under compulsion:—in other words, if a person threaten another, by saying to him, “kill me, or I will kill you,” and the person thus threatened perceive that if he do not kill the other he will himself be slain, and accordingly kill him [the compeller,] nothing whatever is incurred;—and so here likewise. The argument of *Haneefa* is, that the slayer has in this instance killed a person of perpetually protected blood, or has destroyed a property [the animal] protected in right of the proprietor. Now the act of an animal is not of a nature to do away its protection; neither can an infant, by any act, forfeit the protection of his blood, notwithstanding it be purely on behalf of his own right, infants not being capable of distinguishing between right and wrong;—(whence it is that an infant guilty of wilful murder is not liable to be put to death;)—in opposition to an adult, or one of sound understanding, as those are capable of so distinguishing. Still, however, retaliation is not incurred by the slaying of the infant or lunatic; because, in the case in question, a reason exists for their blood being out of protection,—namely, the repulsion of evil. A person attacked by them, therefore, is allowed to slay them, under a condition of responsibility, in the same manner as a person

person who eats the provisions of another in a time of famine is responsible for the value;—and the fine of blood is accordingly due.

If a person draw a sword upon another, and strike him, and then go away, and the person struck, or any other, afterwards kill this person, he is liable to retaliation. This is where the striker retires in such a way as indicates that he will not strike again; for as, upon his so retiring, he no longer continues an assailant, and the protection of his blood (which had been forfeited by the assault) reverts, retaliation is consequently incurred by killing him.

Retaliation is incurred by killing a person whilst going off, after having made an attack upon another.

If a person come in the night to a stranger, and carry off his goods by theft, and the owner of the goods follow and slay him, nothing whatever is incurred, the prophet having said, "*He may kill in preservation of your property.*" It is to be observed, however, that this is only where the owner cannot recover his property but by killing the thief; for if he know that upon his calling out the thief would relinquish the goods, and he notwithstanding neglect calling out, and slay him, retaliation is incurred upon him, since he in this case slays the person unrighteously.

A thief may be slain, whilst in the act of theft, without penalty.



## C H A P. III.

## Of Retaliation in Matters short of Life.

Retaliation is  
inflicted for a  
hand

IF a person wilfully strike off the hand of another at the wrist, his hand is to be struck off in return, notwithstanding it be larger than the hand of the other; because the word of GOD (in the KORAN) "says, "THERE IS RETALIATION IN CASE OF WOUNDS;"—and also, because, as the point upon which retaliation turns is *a perfect equality*, it is therefore to be inflicted in every case where an attention to such equality is possible; and as this is possible in the case of striking off the hand at the wrist, it is therefore incurred in that instance. No regard, moreover, is paid to the size of the hand; because there is no difference in the use or advantage of a hand according as it may be large or small.

or foot  
(struck off at  
the joint,) an  
ear, a nose,

IF a person strike off the foot of another at the ankle, or cut off the *nose* or *ear* of another, retaliation is to be inflicted upon him in return, since in such cases it is possible to attend to equality, as those are all distinct members.

or an eye (if  
not forced out  
of the socket;)

IF a person strike another on the eye, so as to force the member, with its vessels, out of the socket, there is no retaliation in this case, it being impossible to preserve a perfect equality in extracting an eye. If, on the contrary, the eye remain in its place, but the faculty of seeing be destroyed, retaliation is to be inflicted, as in this case equality may be attended to by extinguishing the sight of the offender's corresponding eye with a hot iron.

IF

IF a person strike out the *teeth* of another, he [the striker] incurs retaliation, although his teeth should be larger; because the *size* of the teeth occasions no difference of advantage in the use of them; and the necessity of retaliation, in such a case, is moreover supported by a text of the KORAN, where GOD has said, "EXACT A TOOTH FOR A TOOTH." and also for the *teeth* &

RETALIATION is not to be inflicted in the case of breaking any bones except the teeth; because it is impossible to observe an *equality* in other fractures, since, if retaliation were exacted in such cases, it is to be apprehended that it might be inflicted to a degree greater or less than the offence.—It is otherwise in the case of *teeth*; for if those be *broken*, retaliation may be inflicted by *filig*, or if they be *struck out*, by extracting with an instrument. but not for *fractures*.

OFFENCES which do not affect life are of two descriptions; *Amd*, or *wilful*; and *Khota*, or *by misadventure*;—and the SEMBLANCE of *wilful* (which, in offences affecting life, we term *manslaughter*) does not here find any place; because the instrument used in taking life is the criterion by which the offence is determined to amount to *manslaughter*, death being different according to the instrument used in producing it; but a destruction of any thing short of life (that is, of member) is not different with relation to the difference in the instrument, as has been already observed. Offences short of life are either *wilful*, or *by misadventure*;

THERE is no retaliation, in offences short of life, between a man and a woman, a free person and a slave, or one slave and another slave. *Shafe'i* maintains that retaliation holds in all these cases,—except where a freeman strikes off the limb of a slave, in which instance the limb of the freeman is not struck off;—for as (according to him) retaliation for parts of the body is a dependant of retaliation for the *person*, (the parts of the body being dependants of the whole man,) and do not induce retaliation between a man and a woman, a free person and a slave, or one slave and another:

it follows that where (agreeably to his tenets) retaliation holds for the *person*, it also holds for the parts of the body, and *vice versa*. The argument of our doctors is, that the *parts* of the body are a species of property: now, in all matters of *property*, equality is destroyed by any difference in the value; and this difference is perfectly evident in the present case, as the LAW estimates the value of the same members, in different persons, at a different rate, stating the fine for striking off the hand of a *woman* (for instance) at only one half, the fine for the same offence committed upon a man; (and in the same manner there is a difference in the value of slaves.) As, therefore, the observance of that equality, indispensable in retaliation, is here impracticable, it follows that it cannot be inflicted. It is to be observed, however, that the inequality now mentioned, (between a man and a woman, &c.) is no objection to retaliation for the *person*, with respect to them, because the *person*, where it involves the *life*, is not held in the same light with *property*.

but they do  
so between a  
Musulman  
and an infidel.

RETALIATION for parts of the body holds between a *Musulman* and an *infidel*, both being upon an equality with respect to *finer* for the offences in question.

Retaliation is  
not inflicted  
where a bone  
is cut through;  
nor for a stab.

If a person strike off the hand of another above the wrist-joint,-- or give him a *stab* in any part, which afterwards heals, there is no retaliation; because here it is impossible to observe equality, *finer* in the former case bones are broken, and in the latter it is likely that if retaliation were inflicted the offender might die, a stab being frequently incurable.

If the cor-  
responding  
member of

If a person paralytic \*, or having withered hands, strike off the hand of a *sound* person, he who is thus dismembered has it at his

\* Arab. *Sbill*, meaning a person afflicted with a palsy in the hands.

option

option either to cut off the defective hand (and nothing more,) or to take the complete fine for his own hand; for as, in this instance, he cannot possibly obtain his *precise* right, he must therefore be necessarily content to take something less, or to accept of a substitute, namely, the fine;—in the same manner as where a person destroys the property of another, of the class of similars, but the species of which is no longer to be found, except what is decayed\*,—in which case the proprietor of the destroyed article has it in his option either to take the *decayed* similar, or the value of what he has lost. Thus, in the case in question, the dismembered person may either take the defective hand of the offender, or a fine for his own hand;—and as, upon his striking off the defective hand, it is evident that he is content therewith, his right to any thing else then fails, in the same manner as where a decayed similar is accepted in lieu of an *undecayed* similar. If, in this case, the hand of the offender mortify and drop off, or be unlawfully struck off, before the person whom he had dismembered has made his choice of fine or dismemberment as above, he is not then entitled to any thing, according to our doctors;—because his appointed right was retaliation, which cannot now be obtained, from the circumstance of its subject no longer existing; and as the *property* [fine] could not be due, or obligatory, but from being chosen in preference before the cutting or dropping off of the hand, and the choice has not been made, his right consequently fails, and entirely drops. It is otherwise where a person, having defective hands, strikes off the hand of another, and then has his own defective hand struck off for theft, or in retaliation; for in this case he must pay the fine for a perfect hand, since here, as his hand has been lost in satisfaction of a *right*, it still (as it were) remains, and he opposes the retaliation.

the main-  
be defective,  
still nothing  
more is due  
than *that*, or  
a *fine*;

and if such  
member be  
(in the mean  
time) lost,  
nothing what-  
ever is due.

\* As in the case of a person destroying any kind of *fruit* towards the close of the season.

There is no  
retaliation  
for the *tongue*,  
or the *penis*;

THERE is no retaliation for the tongue, or the virile member.—It is recorded, from *Abou Yoozaf*, that if either have been cut from the root, retaliation is due, as an observance of equality is then practicable. The argument of our doctors is that, as the yard of a man is sometimes in a *flaccid* and sometimes in a *turgid* state, it is impossible to pay a strict regard to equality in cutting it off;—except where the *nut* only is to be separated at the *glans*, in which case the spot for cutting is precisely ascertained.

or for any  
privation, the  
extent of  
which cannot  
be precisely  
ascertained.

IF a *part* of the nut of a man's yard be struck off, there is no retaliation, as it is impossible to take off that precise quantity.—It is otherwise with respect to the *ear*;—for where either the *whole* ear, or a part, is struck off, retaliation is incurred, as the ear is not occasionally flaccid and turgid, but of certain ascertainable dimensions,—whence it is possible to observe equality in this instance.

IF a man cut off the whole of another's lip, retaliation is inflicted upon him, because here an observance of equality is practicable. It is otherwise where a *part* only of the lip is cut off, as in that instance equality cannot well be observed.

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SECTION.

## SECTION.

WHEN the heirs of a murdered person enter into a composition with the murderer for a certain sum, retaliation is remitted, and the sum agreed for is due, to whatever amount; because God has said, in the KORAN, "WHERE THE HEIR OF THE MURDERED PERSON  
 " IS OFFERED ANY THING, BY WAY OF COMPOSITION, OUT OF  
 " THE PROPERTY OF THE MURDERER, LET HIM TAKE IT;"—  
 and also because the prophet has said, "*The heir of the murdered person is at liberty either to take retaliation, or a fine with the murderer's consent.*" As, moreover, retaliation is a right of the heirs, which they are at liberty to remit entirely by a free pardon, it follows that they may also remit it for a return, since their so doing is advantageous to them, and life to the murderer. It is therefore lawful, with the consent of the avenger of blood and the murderer;—and it is the same whether the sum be great or small; for as the LAW does not specify any particular amount, it is consequently left to the parties, in the same manner as the considerations for *Khoola* or *Kitabat*.

Retaliation may be commuted for a sum of money,

IF the murderer enter into a composition with the heirs of the person murdered, without any mention being made of a prompt or distant payment, the sum agreed upon must be paid down; because this sum is made obligatory by a contract; and the original rule, in such contracts, is a *prompt*, not a *distant* payment;—in the same manner as holds in the cases of *dower*, and the *price* of property. It is otherwise with respect to the *Deyit*, or fine of blood, that not being imposed by a *contract*, but particularly appointed, and its rate stated, by an institute of the LAW.

payable on the spot, if a term of credit be not stipulated.

Q q 2

If

In a composition for murder, where a *slave* is concerned, his proportion is the same as that of a *freeman*.

IF a freeman and a slave together murder any person, and the freeman and the slave's master afterwards desire some man to compound the matter [with the deceased's heirs,] on behalf of both the murderers, for one thousand *dinms*, and he compound it accordingly, the whole is due from them (the master and the other) in equal proportions; because they are co-parties in the contract of composition; and the thousand in question is due as a substitute for retaliation; and as both are equally liable to retaliation, the substitute for it must therefore be paid by them in equal shares.

One of several heirs compounding a murder, defeats the right of the rest to retaliation,—and they get their shares of the fine of blood,

IF one of the heirs of a murdered person pardon the offence, or enter into a composition with the murderer for a sum of money opposed to his share of retaliation, the right of all the heirs to retaliation ceases, and they get, in either case, their respective proportions of the fine of blood.—It is here to be observed, as a rule, that as retaliation is the right of *all* the heirs, so likewise is the fine of blood. According to *Shaf'ei* and *Málik* the fine of blood is the right of all the heirs except a husband or wife; because an heir is the successor (or, in other words, the substitute) of the deceased in virtue of *affinity*, and not of any secondary cause, such as marriage, which at death ceases to exist.

OBJECTION.—It would hence appear that a husband and wife do not inherit of each other with respect to *other* property likewise, since the *cause* is terminated by the decease of either.

REPLY.—According to *Málik* and *Shaf'ei*, the fine of blood is not due until *after* death: contrary to all other property, the right of the heirs being connected with the estate of the deceased in the commencement of his sickness, (whence it is that the acts of a sick person do not hold good with respect to any thing beyond a *third* of his property,) and confirmed by his demise; and accordingly, his estate goes among the *whole* of his heirs, without any exception. It is otherwise with a *fine of blood*; for as that is not due until after death, and the cause

cause \* is terminated by the decease of the party, it follows that it cannot be inherited by the *wife* or *husband*.

—The arguments of our doctors upon this point are twofold.—

FIRST, the prophet decreed to the wife of *Asbeem Zeeabee* an inheritance in the fine imposed for the blood of her husband.—

SECONDLY, the fine is a right to which inheritance appertains, inasmuch that if a person be slain, having two sons, and one of those sons afterwards die, leaving a son, his heir, the fine is shared between the son and the son's son. It is therefore established on behalf of *all* the heirs indiscriminately; and the effect of marriage continues with respect to inheritance, after the demise of either of the parties. It is here proper to remark, that where one of the heirs grants a pardon, as above, the shares due to the others are

payable  
within three  
years:

payable within three years. *Ziffer* maintains that payment must be made within *two* years, in a case where the right of retaliation lies between two persons, and one of them grants a pardon; for here an *half* fine is due, whence this is the same as where a person strikes off the hand of another by mistake, in which case an *half* fine is due, payable within two years. The argument of our doctors is that the half here due is a proportion of the fine of blood; and as the whole of a fine of blood is payable in three years, so likewise is any part of it. The proportion due on account of a *hand*, on the contrary, is the *whole* of the recompence for a *hand*, which is payable in two years; and therefore the analogy urged by *Ziffer* in this particular is not admitted.—

It is likewise proper to observe that the proportions owing to the remaining heirs, (as here mentioned,) is due from the property of the murderer, the act being in this case *wilful*.

\* Meaning, the ground of inheritance between husband and wife, namely, marriage.



Composition by the heirs of *one* murdered person does not prevent retaliation with respect to a *second* murder.

... If a man murder two persons, and the heirs of one of the murdered persons grant a pardon, still the right of retaliation remains on behalf of the heirs of the *other* murdered person; because in this case there are *two* retaliations, each murder being a distinct and separate act.—It is otherwise in the preceding example, for there *one* retaliation only is incurred; one murder only having been committed.

All the persons concerned in a murder are alike liable to retaliation.

If a number of persons unite in murdering a man, analogy suggests that *one* of them only is to be put to death in retaliation, as equality is indispensable in the infliction of retaliation, and between *ten* persons (for instance) and *one* person there is no equality.—The whole are, however, liable to suffer death, analogy being in this instance abandoned for a more liberal construction of the law;—because it is related that when, on a certain occasion, seven of the inhabitants of *Lena* \* murdered a man, *Omar* decreed retaliation upon all the seven, saying, “If the *whole* people of *Lena* had assisted in the “murder, I should certainly have slain them *all*;”—and also, because murder is still more likely to be committed by *several* than by *one*; and retaliation has been ordained for the purpose of determent, and a warning to the vicious.—Each individual concerned is therefore as if he alone had committed the act; and consequently equality is certified, and retaliation incurred, in order that the lives of mankind may be in security.

Case of a person guilty of *several* murders.

If one man murder several persons, and the heirs of all the murdered persons appear together, the murderer is put to death on behalf of the whole, nor are the heirs entitled to any thing further.—If, also, *one* of the heirs only appear, the murderer is slain on behalf of him, and the right of the others is consequently annulled.—*Shafci*

\* Pronounced, also, *Laneh*, or *Lanaa*. It is a city pleasantly situated in the southern part of *Arabia Felix*, and about one hundred miles east of *Mekka*.

maintains

maintains that the murderer is put to death on behalf of the heir of the person first murdered, and a fine of blood is due to the others; and that, if all the heirs appear together, and it be not known which of the persons was first murdered, the murderer is slain on behalf of the whole, and a fine of blood divided among all.—The reason he alleges is that, in the example here supposed, several murders are committed by one man; but one murder only is proved against him\*; and as between *one* murder and *several* murders there is no equality, he is therefore put to death on behalf of one person only, and a fine is due to the others.—The arguments of our doctors upon this point are threefold. FIRST, Each of the heirs of the several persons murdered is here supposed, in fact, to execute retaliation upon the murderer completely and individually; as in the preceding example of several persons murdering one,—where each of the several murderers is as if he had alone committed the murder, otherwise retaliation could not be inflicted because of inequality; and so likewise, in the case in question, as each of the heirs is as if he himself executed the retaliation, equality is in this way established. SECONDLY, There proceeds, from each heir, in this instance, a wound, sufficient to dispatch the soul [of the murderer]; and consequently the death [of the murderer] is referred to each of them individually:—for it is a rule that whenever an effect springs from a variety of causes, it must necessarily be referred to those causes collectively; and it then must follow, either that a *part* or the *whole* of the effect is referred to each particular cause; and as the former is here impossible (since the dispatching of the soul from the body is a thing incapable of division, so as to have any part of it in particular referred to any particular cause) it is therefore determined that the whole effect is referred to each cause individually.—THIRDLY, retaliation has been instituted with a view to the security of mankind, under a precept which militates against

\* Because *one* murder alone being sufficient to convict the criminal, none of the others are adduced in judgment against him.

it, the prophet having said, "*Man is the chosen vessel of God;—ac-*  
"*ursed is he who destroyeth the same;—*and as this security is obtained by putting the murderer to death, retaliation alone is therefore sufficient, and consequently no fine is required.

Retaliation is done away by the death of the murderer.

WHEN a person who had incurred retaliation dies, the right to retaliation necessarily ceases\*, as the subject of it no longer remains.

Two men uniting to maim a third are not liable to retaliation.

IF two men cut off the hand of one man, by both seizing a knife and applying it to the joint, until the hand be separated, retaliation is not to be inflicted on either of them, but they are responsible for one half of the fine of blood; because the mulct for a hand is half the fine for the person; and as they united in depriving the man of his hand, the half of the fine of blood therefore falls upon each.—*Shaf'ei* maintains that the offenders are each to be deprived of a hand; because the hand is a dependant of the person; and as, if two men kill one, retaliation is executed upon both, so in the same manner, in the case of a hand, as it is a dependant of the person, retaliation is executed upon both the offenders.—Besides, retaliation, whether for the person, or for parts of the body, has been ordained for the purpose of determent.—Hence, whatever is established with respect to the *person* for the purpose of determent, is likewise established with respect to the parts of the body for the same purpose; and as, in cases concerning the person [life,] retaliation is inflicted upon both the murderers where two men murder a third, so likewise, in a case of dismemberment, retaliation is inflicted upon both.—The arguments of our doctors upon this point are twofold. FIRST, each of the offenders, respectively, has cut off a part of the hand, inasmuch as the amputation has been effected by both, and the subject is capable of par-

\* Consequently, no fine is due, either from the murderer's estate, or from his *Akila* titution.

tion.—A part of the amputation is therefore referred to one of the offenders, and a part to the other; and as there is no equality between the amputation of a *part* of the hand, and the amputation of the *whole*, there cannot, consequently, be any retaliation. It is otherwise in cases affecting the person [life,] as the act of dispatching the soul from the body is incapable of partition. **SECONDLY**, in a murder committed by several persons, (that is, where a number unite in murdering one,) it is most probable that no one will come to the assistance of the murdered; whereas, in the case of two persons uniting to cut off the hand of a third, as there is necessarily a considerable delay in the execution, it is most probable that the person they design to injure may obtain assistance before they effect their purpose.—Hence between the case in question and a case affecting the person there is no analogy.

If a man strike off the right hands of two others, or the *left* hands of two, and both appear against him, the right hand of the offender is cut off in the former instance, or his left hand in the latter,—and a moiety of the fine of blood is moreover exacted from him, and divided equally between the parties;—and this whether the hands were struck off, both at the same time, or one after the other. —*Shafei* maintains that in the latter instance, the hand of the offender is struck off solely on behalf of him who was first deprived of his hand; and that where both hands were struck off together, the parties draw lots, and the retaliation is then executed on behalf of him to whose lot it falls.—The argument of our doctors is that, as the dismembered parties are upon an equality with respect to the ground of their claim, (each having lost a hand,) they are therefore upon an equal footing with respect to the *effect* also, namely, the retaliation,—in the same manner as two creditors are upon an equal footing in their claims upon the estate of a deceased person, notwithstanding

A person maiming two others is liable both to retaliation and fine;—

ing the debt owing to one be of prior date to that owing to the other\*.

and, if only *one* of the two appear, retaliation is executed on his behalf, and the other gets the fine.

If a man strike off the right hands of two others, or the *left* hands of two, and only *one* of the parties appear, retaliation is executed on behalf of this one, and a moiety of the fine of blood is due to the other; because the party present is entitled to take his right; and the right of the absent party is dubious, since it is possible that, if present, he might either pardon the offence or decline prosecuting; and it is not allowable to make any delay in rendering à *certain* right on account of one which is merely *conjectural*;—and as, upon the party present taking the retaliation, the subject on which the other party might execute it no longer remains, the fine is the appointed right of the other, since here the offender has lost his hand on account of a right which lay against him, and may therefore be said to have *abstracted* the right of this one.

A slave may be put to death on confessing a murder.

If a slave confess a murder, he incurs retaliation. *Ziffer* maintains that the acknowledgment of a slave is not valid in this instance; for as he, by such acknowledgment, sets at nought the right of his master, it therefore cannot be admitted, any more than the acknowledgment of a slave concerning property†.—The arguments of our doctors upon this point are twofold. FIRST, a slave, in confessing a murder, is not liable to any suspicion, since such confession is essentially prejudicial to himself, as being productive of his death.—SECONDLY, a slave, with respect to his *blood*, continues in his original

\* The translator apprehends that little apology is necessary for his here omitting the arguments advanced by *Shafii* in support of his doctrine, and the reasonings adduced by the *Hanefite* doctors in reply to them, as they are much of the same complexion with those which have been already recited.

† A slave's acknowledgment concerning property is not of any weight. See Vol. III. p. 138.

state

state of liberty, freedom being the original state of MAN,—whence it is that the acknowledgment of a master, inducing punishment or retaliation upon his slave, is not admitted.—With respect to the argument of *Ziffer*, we observe that the acknowledgment of murder, by a slave, is prejudicial to himself *positively*; but it is so to his master only by *implication*, which is of no weight.

IF a man wilfully shoot an arrow at any person, and the arrow pass through that person, and then hit another, and they both die, retaliation is incurred on behalf of the former person, and a fine of blood on behalf of the latter, to be paid by the *Akilas* of the murderer;—because the *first* killing is *murder*; whereas the *second* is only *homicide by misadventure*,—in the same manner as where a person shoots at a deer, and his arrow hits a man.—An act, moreover, is estimated according to the number of its effects; and hence it is possible that the act of the murderer, in shooting the arrow, was wilful with respect to the one person, and inadvertent with respect to the other.

Case of murder and erroneous homicide united.

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## SECTION.

IF a man strike off the hand of another by mistake, and then slay him wilfully before he has recovered from the wound,—or, strike off his hand wilfully, and then slay him by mistake before he has recovered,—or, strike off his hand by mistake, and after the wound is healed slay him by mistake,—or, strike off his hand wilfully, and after the wound is healed slay him wilfully,—he is prosecuted on

Cases of maiming united with homicide.

R r 2

both

both counts in all these cases\*.—The ground of this is that both the wounds must be considered under one head, if it be possible that the *second* wound was merely a completion of the *first*, as slaying is most frequently effected by several successive wounds; for if each wound were considered separately, one being regarded as mortal, and the other not, it would create a difficulty in the determination.—The second wound is therefore to be regarded merely as a completion of the first, and both included under one sentence,—except where this conjunction is impossible, when each wound must be considered under a separate head.—Now, in the four cases here stated, this conjunction cannot be made; for, in the two *first* cases, the two acts are subject to two different sentences,—and in the two *others*, the second wound is not inflicted until after the party has recovered from the *first*, a circumstance which prevents the one from having any connexion with the other.—If the second wound be inflicted before the first is healed, and the acts be both of the same species, both being by *mistake*, they are resolved under one head, undisputedly, since a conjunction is in this instance possible;—and therefore one fine suffices.—If, on the contrary, the offender first strike off the hand wilfully, and then, before the wound is healed, kill the person wilfully, the magistrate may desire the heirs either first to strike off the offender's hand, and then to put him to death,—or to put him to death at once, without striking off his hand;—in other words, the heirs have either of these modes in their choice, and the magistrate also is at liberty to determine either way.—This is according to *Haneefa*.—The two disciples maintain that the offender, in this instance, can only be put to death; and is not to have his hand struck off besides; for here it is possible to resolve both the wounds under one head, both

\* In the *first* of these cases, therefore, the offender's property is subject to a fine for the hand, and he also suffers retaliation for the murder; in the *second*, he is subject to retaliation for the hand, and also to a fine for the homicide; in the *third*, he is subject to a fine for the hand, and also to a fine for the homicide; and in the *fourth* he suffers retaliation, first for the *hand*, and then for the *murder*.

the

the acts being of one species, namely *wilful*. The argument of *Haneefa* is that in this case a conjunction of both wounds under one head is impossible; because the two acts are essentially different, one being merely the dismemberment of a part of the body, whereas the other is a deprivation of life.—Both, moreover, as being *wilful*, are subject to the same rule, namely, retaliation; and retaliation requires an equality with respect to the act, which, in the case in question, cannot be observed but by taking life for life, and a hand for a hand: but if both wounds be resolved under one head it is impossible to preserve equality, because in that case the offender is only slain, without any retribution for the dismemberment.—Besides, the murder prevents any reference of the consequence to the dismemberment, inasmuch that if the two acts were to proceed from two different persons, retaliation would be due upon the murderer.—These two offences are therefore subject to the same rule as the two between which a recovery intervenes\*.

If a person give another one hundred stripes [with a stick or rod,] and the person so struck recover from *ninety* of the stripes, so as that no mark of them remains, and then die in consequence of the ten last stripes, one fine of blood is due;—because, upon his recovering from ninety of the stripes, they are no longer of any consideration with respect to the *fine*, notwithstanding they still be so with respect to correction; and hence, with respect to the fine, no more than ten stripes remain to be considered.—The same rule obtains with respect to every wound which heals and leaves no mark, according to *Haneefa*.—*Abou Yoosaf* alledges that in such cases a fine is due in proportion to the pain or trouble sustained;—in other words, an estimate must be made of what is the adequate recompence for so much trouble, and the result gives the fine to be imposed.—*Mohammed*, on the

Case of a person dying in consequence of stripes unjustly inflicted;

\* A long train of futile reasoning is here omitted, as being of no consequence whatever to the subject, nor tending to throw any new light upon it.



other hand, says that nothing is due in such a case except the expences of the physician or surgeon.

or being cut  
thereby.

If a person give another one hundred stripes, and thereby cut him, and the cuts heal, but leave scars, an *Hakoomit Adil*, or award of equity, is due on account of such scars.—(An explanation of *Hakoomit Adil* shall be given in its proper place \*.)

Forgiveness  
by a maimed  
person does  
not exempt  
from a fine,  
in case of his  
death,  
unless it ex-  
tend to any  
consequence of  
the maiming.

If a person strike off the hand of another, and the person so dismembered pardon the dismemberment, and afterwards die in consequence of it, a fine of blood is due,—from the offender's property, if the offence was wilful,—or from his *Akilas*, if it was by misadventure.—If, on the other hand, he pardon not only the dismemberment, but also any consequence which may arise from it, and afterwards die of the wound, his pardon comprehends both *life* and *dismemberment*;—and then, if the offence was committed by mistake, the pardon is estimated as from one third of the deceased's property †; but if it was committed wilfully, the pardon is in that case estimated as from the *whole* of the property ‡. The reason of this is, that the decree in wilful murder is retaliation; and as retaliation is not property, the right of the heirs is not connected with it before the demise of the wounded person, wherefore the pardon and remission are valid on his part, and are consequently estimated as from the whole of his property. Manslaughter, on the contrary, is subject to the law of property; and as the right of the heirs is connected with the dying person's property, the remission, therefore, in such case, is estimated as from the *third* of the property; because it is a gift of the fine; and the gift of a dying person takes effect in one third; and as this is a bequest to the *Akilas* of the murderer, not to the murderer

\* In the next following book, treating of *Fines*.

† That is to say, it has effect in remitting one third of the fine; but fails with respect to the other two thirds, which therefore still remain due, notwithstanding the pardon.

‡ In other words, it has effect in a complete remission of the fine.

himself,

himself\*, it is consequently valid.—This is according to *Haneefa*.—The two disciples maintain that pardon for the dismemberment extends also to life;—(and the same difference of opinion obtains where a person pardons another for giving him a cut, of which he afterwards dies.) Their argument is, that the pardon of the dismemberment is also a pardon of its effect, which must be one of two things, namely, *the loss of a hand* in case of a cure, or *the loss of life* in case the wound prove fatal. A pardon of dismemberment, therefore, is also a pardon of one of these effects, whichever it may happen to prove. Another argument is, that the term *dismemberment* extends both to a *mortal* wound, and also to one *not* mortal; and therefore a pardon of *dismemberment* is a pardon either way; this being the same as a pardon of an *offence*;—in other words, if the wounded person were to say, “I pardon this *offence*,” a pardon is established in both ways, the term *offence* comprehending *mortal* wounds and also wounds *not* mortal. The argument of *Haneefa* is, that here a cause of responsibility is established in the death of a person whose blood was in a continual state of value and protection; and to this the pardon does not expressly extend, because it was granted with respect to the *dismemberment*, which is different from the *death*; and in consequence of the wound proving mortal it becomes evident that the act was in reality murder; and with that also the right of the murdered person is connected; and as no pardon was granted with respect to *that*, a decree of responsibility for it issues. Analogy would suggest that retaliation is incurred for it, as being a *wilful* murder: but on a more favourable construction of the LAW a fine only is due, as in consequence of forgiving the dismemberment a demur is engendered, and retaliation is repelled by any demur. In reply, moreover, to the arguments of the

\* The reason of this distinction is, that any bequest by a murdered person on behalf of his murderer is null.—The pardon is here considered in the light of a *bequest*; for as the fine for his hand virtually belongs to the dismembered person from the instant of the act, his remission of it is, in effect, a *bequest* of it to the *Avilas* of the offender.

two disciples it is answered, that the consequence [death] is murder from the beginning, and not merely one description of effect produced by dismemberment; and therefore a pardon of the *dismemberment* is not a pardon of the *murder*. It is otherwise in the pardon of an *offence*, as the term *offence* comprehends both *murder* and *maiming*. It is also otherwise in the pardon of a *cut*, and of every consequence which may arise from it, since in this case the pardon is expressly extended to death itself.

Case of a woman marrying a man in recompence for maiming him.

If a woman strike off the hand of a man, and marry him, as a recompence, and he afterwards die of the wound, the woman is entitled to her proper dower, and a fine of blood is due—from the *Akila* if her offence was involuntary, and from herself if it was wilful; because, according to *Haneefa*, a forgiveness of the dismemberment is not a forgiveness of the consequence, and therefore her marrying him in recompence for the dismemberment merely implies a pardon of the dismemberment itself, but not of any effect which may result from it. Hence she is still liable to the fine of blood in case the man die. It is here to be observed that if the dismemberment have been wilful, the marriage on account of such dismemberment is a marriage in lieu of retaliation; and as retaliation, not being property, is incapable of constituting a dower, the woman is still entitled to her proper dower. A dower being therefore due to the woman, and a fine owing from her, there is a mutual liquidation in case both be of an equal amount; or if the fine be more than the dower, the woman is to pay the difference to her husband's heirs; or if it be less, the heirs must pay her the difference. If, on the contrary, the dismemberment have been *accidental*, the marriage is in lieu of a *muht* for the hand; but as, upon the dismemberment proving fatal, it is ascertained that no fine is due for the hand, it follows that the specific sum which stood for the dower no longer exists, and consequently that a proper dower is due;—in the same manner as where a woman marries a man “*for what is in his hand*,”—and it prove that he had  
nothing

*nothing* in his hand,—in which case a proper dower is due, and so here likewise. In this last instance, moreover, there is no mutual liquidation of the dower by the fine of blood [due in consequence of the husband's decease;] because, as the offence was not *wilful*, but by *misadventure*, the fine falls not upon the *woman*, but upon her *Akilas*,—whereas the dower is the right of the woman herself; and there can be no mutual liquidation unless each party owe something to the other.

If, in the example above stated, the man marry the woman “as a satisfaction for *the dismemberment, and every consequence which may result from it,*” or “as a satisfaction for *the offence,*” and he afterwards die of the wound, the woman is entitled to her proper dower if the dismemberment was *wilful*; because, in this case, she married in lieu of retaliation; and retaliation, not being *property*, is incapable of constituting a dower;—in the same manner as where a woman marries for *wine* or a *bog*;—in which case, those articles not being property, she is entitled to her proper dower;—and so here likewise. In this instance, moreover, the retaliation is completely remitted, and nothing remains due from the woman [in lieu of it;] for upon the man constituting retaliation the dower, he becomes content that it should be remitted on behalf of the same. The original retaliation, therefore, ceases, in the same manner as where a person remits retaliation on the condition of its being converted into property; and no fine is due (in consequence of the decease of the wounded person,) because the offence was *wilful*\*. If, on the contrary, the dismemberment was *accidental*, the fine of blood is in that case considered as the woman's dower, and a proportion of it adequate to her proper dower is *remitted* from her *Akilas*, and the remainder is re-

\* In consequence of the offence being *wilful*, the fine for it would be due from the woman herself, and not from her *Akilas*.

garded as a *bequest* to them \*; for here the marriage in recompence of the dismemberment is a marriage in lieu of the *consequent*, namely, the *fine*; and as the fine, being itself property, is capable of constituting a dower, it is the dower accordingly;—but this only in the proportion of the woman's *proper* dower. With respect to the remainder, it is considered as a bequest to the woman's *Akilas*, which they are competent to benefit by, as not having been themselves concerned in the bloodshed. If, therefore, the amount do not exceed one third of the deceased's property, the *whole* is remitted to them; or, if it exceed, they have to pay the difference to the heirs †.

Retaliation for maiming does not exempt from retaliation for the *person*, in case of the death of the maimed.

If *Zeyd* wilfully strike off the hand of *Khàlid*, and suffer retaliation, and *Khàlid* afterwards die in consequence of the loss of his hand, *Zeyd* is still liable to be put to death in retaliation, as he then appears to have murdered *Khàlid*, who is consequently entitled to retaliation for the *person*. The heirs of *Khàlid*, therefore, may put *Zeyd* to death, as the right of *Khàlid* to retaliation for the *person* is not done away by the dismemberment of the offender;—in the same manner as where a man, being entitled to execute upon another retaliation for the *person*, takes a limb from that other;—in which case his right to retaliation for the *person* is not annihilated; nor is any thing due for the *limb*, as the *whole person* was forfeited, and the *limb* was only a part of it; and so likewise in the present instance. *Abou Yoozaf*

\* The reason of this distinction is that, in *accidental* offences, the *fine* falls upon the *Akilas*, not upon the *offender*; whereas, in the case of *wilful* offences, the fine being always considered as a compromise for retaliation, falls upon the offender alone, the *Akilas* having no concern in it.

† To understand the phraseology which runs through this and the preceding example, it is necessary to recollect that a dower, like any other consideration, may be understood either by an *actual payment* of something to the woman, or by the remission (on the part of the husband) of something owing from the woman.—When, therefore, we say, “the *fine* constitutes the dower,” or “*retaliation* constitutes the dower,” nothing more is meant than that the woman marries the man in consideration of those being remitted to her.

alleges

alleges that upon cutting off the offender's hand, the right to any further retaliation ceases, as the retaliation being executed in that manner, the offender is discharged from all further consequences. To this, however, it may be replied that the hand of the offender was struck off only under the idea of that being the sole right; and that therefore the offender is not discharged from retaliation for the *bloodshed*, as the death of the wounded person had not then taken place.

If the heir of a murdered person cut off the hand of the murderer, and remit any farther retaliation, either before or after the decree of the magistrate, authorizing the same, he [the heir] owes a fine for the hand, according to *Haneefa*. The two disciples, on the contrary, maintain that nothing whatever is due; because here the heir of the murdered person has taken what was his right, and consequently is not required to make any atonement; for he is entitled to destroy the person of the murderer *in toto*; and as a *limb* is merely a dependant of the *person*, it follows that he is entitled to destroy any particular *limb*. He is therefore not required to make any atonement whatever,—whether the dismembered murderer pardon him or otherwise,—or, the wound prove fatal or otherwise,—or, he first strike off the hand and then take the life, either before or after the wound is healed;—this case being analogous to one where, retaliation for the hand being due, the person who is to exact it first strikes off the *fingers* of the offender's hand, and then remits the retaliation upon the hand,—in which case he is not responsible for the fingers. The argument of our doctors is that in this instance the heir has taken what was not his right; for *killing* was his right, not *dismemberment*. A fine is therefore due for the hand of the murderer thus unjustly struck off. Analogy, indeed, would suggest that the murderer's heir is here entitled to exact *retaliation* for the hand:—that, however, is remitted because of a doubt; for it was lawful for him to strike off the murderer's hand as a dependant of his *person*. Retaliation, therefore, being thus remitted,

An heir executing retaliation for murder, by maiming, without authority from the magistrate, is liable to a fine.

the fine is due:—*after*, however the murderer recovering from the wound, and not *before*; for it is possible that the wound may prove mortal, in which case the murderer's heir is entitled to take his right \*.

In retaliation  
for maiming,  
a fine is due,  
if it occasion  
death.

If a person be entitled to retaliation upon another with respect to any part of the body, and strike off that part accordingly, and the person upon whom retaliation is thus executed die in consequence, the person in question is liable for a fine of blood, according to *Haneefa*. The two disciples allege that he is not in any respect responsible, since he has only taken what was his right, and it is impossible to restrict dismemberment to the condition of *safety*,—(in other words, to require that it be executed so as not to endanger the person who suffers dismemberment,) for if such were the case, retaliation would be altogether prevented, it being impossible always to avoid its proving fatal. The person in question, therefore, stands in the same predicament with an *Imâm*, a *cupper*, or a *phlebotomist*;—in other words, if an *Imâm* execute retaliation by cutting off a limb, or a cupper apply his cupping-horn, or a phlebotomist use his lancet, by desire of a patient, and the wound so occasioned prove fatal, still no fine is due; and so here likewise. The argument of *Haneefa* is that the person in question has slain another wrongfully; because his right was to *dismember*, not to *kill*, but here he has *killed*. Now, such being the case, analogy would suggest that *retaliation* is incurred by him, as having wilfully and without right slain another. Retaliation, however, is remitted in this instance, because of the doubt which here exists; for the person, in cutting off the limb, did not intend to destroy life, but merely to take his right. A fine, therefore, is due from him. It is otherwise with respect to the *Imâm*, the cupper, or the phlebotomist, for all these act upon authority,—the *Imâm*, in virtue of his office,

\* The reply to the arguments of the two disciples is omitted in the translation, as being, for the most part, merely a repetition of what had gone before.

which

which requires him to perform such acts for the good government of the people,—and the cupper or phlebotomist, in virtue of orders from and agreement with the person upon whom they perform their operations. It is to be observed, moreover, that the performance of any thing strictly incumbent is not restricted to the description of *safety*,—such, for instance, as the shooting of an arrow at an enemy:—but in the case in question there is nothing strictly *incumbent*;—nay, forgiveness is rather commendable, God having said, “IF YE REMIT RETALIATION, IT IS A KINDNESS.” The taking retaliation for the *hand*, therefore, is a matter of indifference, in the same manner as hunting game; and consequently is restricted to the condition of *safety*.

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## CHAP. IV.

### Of Evidence in Cases of Murder\*.

IF a person be slain, and leave two sons, one present †, and another absent, and he who is present establish evidence to the fact, and the other afterwards appear, it is in this case requisite that *he* also establish evidence to the fact, according to *Haneefa*. The two disciples, on the contrary, maintain that there is no occasion for this. If, how-

Evidence to murder must be established by each heir separately, and independent of the other.

\* The term is here to be understood in a general sense, including every species of homicide.

† In the city, or the court of the *Kāzar*.

ever,



ever, the person was slain by *misadventure*, there is in that case no occasion for a second establishment of evidence, according to all our doctors, any more than in the case of proving a debt due to the deceased. The argument of the two disciples, in the point where they differ from *Haneefa*, is, that retaliation is established to the heirs in the manner of an *inheritance*;—in other words, the right to retaliation is first established in the ancestor \*, and then devolves to his heirs, in the same manner as a debt; for as retaliation is a retribution for the *person* †, the right to it therefore rests with him to whom the *person* belongs, namely, the *murdered* person, in the same manner as the *fine*, which belongs to the murdered in virtue of his right to retaliation; whence it is that if the retaliation be converted into a *property*; by the heirs compounding it for a sum of money, such property is considered as belonging to the murdered, insomuch that his debts may be discharged therewith, and his bequest also holds with respect to it; and likewise, that retaliation is entirely remitted by the deceased having forgiven the offence after he was wounded. Any one of the heirs, therefore, is prosecutor on behalf of the others. The argument of *Haneefa* is that retaliation is established to the heirs merely by *substitution*, and not as an *inheritance*. Now by substitution is here to be understood one person standing in the place of another in performing that other's act. Thus, in a case of bloodshed, where it has been wrongfully committed, the person slain is entitled to do the same by the slayer: but as he is incapacitated from this by death, his heirs are his substitutes for the execution of it;—*not* that he has any *property* in that act, which afterwards devolves to his heirs,—for retaliation is not established until *after* the decease of the murdered person, and a defunct is incapable of having any property in retaliation, as it is an

\* Arab. *Mawris*, meaning the person from whom inheritance descends. (See note in Vol. II. p. 705.)

† Arab. *Zât*, meaning the *self*,—the body as connected with the soul. (See note in p. 276.)

*act,*

*act*, and it is impossible that any act should proceed from the *dead*.—The deceased, therefore, has no property in the retaliation. It is otherwise with respect to debts, or the fine of blood, as these are property, and a defunct is capable of being a proprietor;—as where, for instance, a game-catcher lays his snares, and then dies, and game is found in the snares after his decease,—in which case the game-catcher is considered as proprietor of the same. Retaliation, therefore, being established by *substitution*, and not as an *inheritance*, no one of the heirs can be litigant for the others;—and as the others stand in need of again establishing their evidence, the absent heir will therefore be required, on making his appearance, to establish evidence on his part.

If a murderer adduce evidence to prove, against the present heir, that the absent heir has remitted the retaliation, in this case the present heir is litigant, and the evidence thus adduced by the murderer being credited, the right of retaliation ceases accordingly. The murderer, moreover, is not in this case under any necessity of producing his evidence again upon the absent heir appearing; for his plea here is that “the right of the present heir to *retaliation* has been commuted “into a right to *property*,”—a plea which cannot be substantiated but by proving the remission on the part of the absentee. In fine, the plea of the defendant is here founded on the plea of the absentee’s remission; and as, in all such cases, the party present is litigant for the absentee, the present heir is therefore litigant for the absent heir in this instance.

Retaliation is remitted by the murderer adducing evidence to prove the remission of it by an absent heir.

If a slave held in partnership between two men be murdered, one of the owners being present, and the other absent, and the *present* owner adduce evidence against the murderer, in this case, upon the absentee appearing, he also is required to adduce evidence. If, also, the murderer adduce evidence to prove that the absentee has remitted the retaliation, in this case the owner present is litigant, and the murderer

murderer is therefore under no necessity of again adducing evidence upon the absentee appearing, for the reasons stated in the preceding examples.

Rule in case  
of two *present*  
heirs bearing  
testimony to a  
remission by  
an *absent* heir.

IF the heirs of the person murdered be *three*, and two of them give evidence against the third, that “ he has remitted the retaliation,” their evidence so given is null, but the retaliation is considered as being remitted *by these two*; because, in bearing evidence as above, they *acknowledge* retaliation to have been remitted, and their acknowledgment, so far as it affects themselves, must be credited.—(The nullity of the evidence, in this instance, is because of its tending to the advantage of the witnesses, as converting *retaliation* into *property*.)—It is to be observed that the case here considered may occur in four different shapes.—FIRST, where the murderer confirms the evidence of the two heirs in question, and the third heir denies it, in which case a fine of blood is due among the three, in equal shares; because the murderer, in confirming the evidence of the two heirs, makes an acknowledgment of two thirds of the fine in their favour; and he at the same time claims that “ the right of the *third* heir has “ dropped, in consequence of the remission granted by the others,” a plea which is resisted by the third heir, and cannot be established by the testimony of the others, inasmuch as their evidence is null,—whence he owes an atonement to this heir likewise, namely, a third of the fine.—SECONDLY, where both the murderer and the third heir confirm the evidence of the two heirs,—in which case two thirds of the fine of blood go to the two testifying heirs, for the reason already mentioned; but the third heir gets nothing whatever, as in confirming the evidence of the other two he acknowledges a remission, and is therefore not entitled to any thing.—THIRDLY, where the murderer and the third heir both deny the truth of the evidence,—in which case the third heir is entitled to one third of the fine of blood;—but the two testifying heirs get nothing whatever; for as they have acknowledged, against themselves, that retaliation has ceased, they must be credited;

credited;—but they at the same time claim that the shares of each have been converted into property\*; and a claim cannot be admitted unless supported by proof, which with respect to them does not appear, as their testimony does not serve for proof in their own cause. The share of the *third* heir, on the contrary, is considered as being converted into property upon the force of their allegation, as that is sufficient proof with respect to *him*.—FOURTHLY, where the third heir confirms the evidence of the other two, and the murderer denies it,—in which case the murderer owes a third of the fine to the third heir; because, in denying the evidence of the two, he acknowledges that the right of retaliation had ceased in consequence of the remission of those two *alone*, and that the share of the *third* is still due in *property*. It is to be observed, however, that this heir, on receiving such *third*, must make it over to the other two; because they claim two thirds of the fine of blood for themselves, and the murderer denies their claim in point of *property*, but acknowledges a *fine* to be due to the third heir, as having acknowledged that the right of retaliation has ceased in consequence of the avowal of the other two heirs, at the same time that the share of the third became converted into *property*. Whatever, therefore, the murderer acknowledges in behalf of the third heir, he [the third heir] acknowledges in behalf of the other two, in having confirmed their testimony;—in the same manner as where a person makes an acknowledgment of a thing as being due to another, and that other declares the thing to belong, not to *himself*, but to a *third* person; in which case the article goes to that third person; and so here likewise. This proceeds upon a favourable construction of the LAW. Analogy would suggest that nothing whatever is in this case incumbent on the murderer, as the two testifying heirs advance a claim for property, which the murderer resists, at the same time making an acknowledgment in favour of the third heir, which he [the third heir] denies, whence it would appear that nothing

\* By this phrase is to be understood "*commuted for a fine*."

is due to him. He, however, gets a third of the fine; on a favourable construction of the LAW, as above set forth,—the ground of which is, that the third heir does not *completely* deny, but passes the matter to the attesting heirs, and acknowledges the property in question to be their right.

Evidence to a person's "dying of a wound," proves the person who inflicted it to be guilty of murder.

IF witnesses give evidence that "a certain person had wounded another with a weapon so as to render him bedridden until at length he died," retaliation is in this case incurred by the person who inflicted the wound;—for whatever is established upon the testimony of witnesses is (as it were) established by *actual sight*; and as, where a murder is *actually seen*, retaliation follows, so here likewise. Evidence to wilful murder is, moreover, established after this manner; as death cannot be ascertained to have been occasioned by any particular wounds, but from the circumstance of the wounded person having been thereby rendered bedridden until he died.

Any essential disagreement in the testimony of the witnesses renders the whole evidence null.

IF two witnesses to murder disagree in their testimony concerning the *time* of the fact, (one stating that the murder was committed on a particular day, and the other that it was committed on *another* day,) or the *place*, (one stating that it was committed in *such* a place, and the other that it was committed in *another* place,)—or the *instrument*, (one stating that it was committed with a *weapon*, and the other that it was committed with a *stick*,) their evidence is altogether null; because the murder to which they testify is a single act; and the murder committed in one place cannot be the murder committed in *another* place; nor is a murder committed with a *stick* the same as with a *weapon*, the former being only *manslaughter*, whereas the latter is *wilful murder*, and these two are subject to different rules:—hence the testimony of each can only be regarded as a separate evidence to a distinct fact; and the testimony of one witness cannot be admitted. In the same manner also, if one of the witnesses testify that "the murder was committed with a *stick*," and the other that

that "it is unknown with what instrument it was committed,"—their evidence is null; because evidence to a murder committed with a *stick* tends to prove only murder in a restricted sense, (as it amounts merely to evidence of manslaughter,) whereas evidence to *positive murder* applies generally, that is, to murder in its most *extensive* (not in a *restricted*) sense;—and the one being altogether different from the other, the testimony of each is therefore separate evidence to a distinct fact.

If two persons give evidence that "a certain person has killed another person, but it is unknown with what instrument," a fine of blood is in this case due [from the alleged murderer,] on a favourable construction. Analogy would suggest that the evidence is not to be credited, as bloodshed bears a different construction according to the difference of the instrument; and therefore the matter testified to (namely, *murder*) is here uncertain; whence the evidence cannot be credited. The reason, however, for a more favourable construction is, that as the witnesses here testify to a murder *unrestrictedly*, the least of the two different penalties in cases of bloodshed (namely, *fine*) is therefore declared due, out of caution. As, moreover, the instrument is here dubious, no one in particular can be proved. It is to be observed that in this case the fine is due from the *murderer*, (not from his *Akilas*,) because all acts are supposed *wilful*, unless they be proved otherwise. Here, moreover, the evidence is given to bloodshed *unrestrictively*, whence there is a doubt with respect to *misadventure*; and a dubious point cannot be established.

Evidence to a murder, which does not ascertain the instrument, proves only manslaughter.

If two persons, respectively, make acknowledgment of their having murdered a particular person, and the heir of the murdered person also assert the same, he is at liberty to put them both to death; whereas, if two persons bear evidence to a man's having murdered a particular person, and two others attest that *another* had murdered

Evidence to a murder in which two are concerned.

T t 2

that

that person, and the heir assert that they had both murdered him, the evidence of both parties is null. The difference between acknowledgment and evidence, in this instance, is that in consequence of both acknowledgment and testimony it is proved that each, respectively, was guilty of the murder, and each is accordingly liable to retaliation independent of the other. In the *former* instance, however, the heir (in whose favour the acknowledgment is made) falsifies the acknowledgment with respect to a part of what is acknowledged,—whereas, in the *second* instance, he falsifies the testimony of the witnesses with respect to a part of the evidence they have delivered on his behalf;—and the falsification of a *part* of an acknowledgment by the person in whose favour the acknowledgment is made does not invalidate the remainder,—whereas the falsification of any part of evidence, by the person in whose behalf it is delivered, invalidates the whole; for falsification is a reprobation\*; and the circumstance of a witness being *reprobate* is obstructive to the reception of his evidence,—but the same circumstance is no obstacle to the validity of an acknowledgment.

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\* The literal meaning is “*falsification renders reprobate*,” that is, destroys a person's credit by calling his veracity in question.—So much *technical* matter occurs here that it is difficult to render the passage into intelligible English.

## CHAP. V.

## Of the Circumstances under which Murder takes place.

IF a person shoot an arrow at a *Mussulman*, and the *Mussulman* apostatize, and the arrow then hit and kill him, the shooter is responsible for a fine of blood, according to *Haneefa*. The two disciples maintain that the shooter is not, in this instance, responsible for the fine, as the life of the *Mussulman* in question had lost its value by his apostacy. The argument of *Haneefa* is, that as responsibility attaches in consequence of shooting the arrow, regard must therefore be paid to the time of shooting it; and as, at that time, the life of the *Mussulman* was valuable, the atonement (that is, the fine) is consequently due from the shooter, notwithstanding the deed was wilful\*, as retaliation is in this case remitted because of doubt,—the person in question not being of protected blood at the time the arrow reached him.

Case of shooting at a *Mussulman*, who, in the interim, becomes an apostate.

IF a person shoot an arrow at an apostate, and the apostate become a *Mussulman*, and the arrow then hit and kill him, the shooter is not liable to any fine, according to all our doctors; (and so likewise, if a person shoot an arrow at a hostile infidel, and the infidel become a *Mussulman*, and the arrow then hit and kill him;) for as the shooting at the person, whilst an apostate or a hostile infidel, was not an occasion of responsibility, because of his not being then in a state of protection, it follows that it does not become so afterwards.

A person shooting at an apostate, who, in the interim, returns to the faith, incurs no penalty.

\* In cases of wilful murder the fine is in general due (not from the murderer, but) from the murderer's *Ahils*.

IF



Shooting at a  
slave, who,  
in the in-  
terim, is  
emancipated,  
induces re-  
sponsibility to  
the master.

IF a person shoot an arrow at a slave, and the slave be emancipated by his master, and the arrow then hit and kill him, the shooter is responsible to the master for the value of the slave, according to *Haneefa* and *Abou Yoofof*. *Mohammed* says that an estimate is in this case to be made of the value the slave bore before the arrow was shot, and his value afterwards; and that the shooter is responsible to the slave's master for the difference; because the manumission precludes the consequence of the offence;—in the same manner as where a person, undesignedly strikes off the hand of a slave, and his master afterwards emancipates him,—in which case the manumission precludes the consequence, inasmuch that neither the fine of blood nor the value of the slave are due, nor (in short) any thing except a mulct for the hand, and the difference occasioned in the value of the slave; for here it is uncertain who the claimant of right is, as at the time of the offence it was the master, and at the time of the consequent death it was the slave, he being then free. The emancipation of the slave, therefore, operates the same as his recovering from the wound;—and the consequence being precluded, nothing remains except the shooting; and as this also is an offence, (since it tends to lessen the value of the slave shot at,) the shooter is consequently responsible for the difference of value thereby created. The argument of the two *Elders* is that the shooter is guilty of murder from the instant of his shooting; for he, in fact, does nothing more than merely shoot; but as this is a matter which was at that time purely optional and in his power, he is consequently responsible for the value of the slave. It is otherwise where a person undesignedly strikes off the hand of a slave, and the wound proves fatal after he [the slave] has been emancipated; for here the offender has destroyed a *part* of the subject, which occasions a responsibility to the master;—and if, upon the wound proving fatal, any thing remain due, it is due on behalf of the *slave*, he being then free. In this instance, therefore, the state of the case in the *beginning* is different from what it is in the *end*, being similar to where the subject undergoes a complete change; and as, where the subject is changed,  
the

the mortal consequence is not established at the first, so here likewise. The mere shooting of the arrow, on the contrary, is not a destruction of any thing previous to its reaching the slave, the only effect of it upon the subject being to lessen its value in the eyes of mankind from the danger it is thus exposed to,—a circumstance not worthy of any regard. No atonement, therefore, is due on account of the mere *shooting*. Upon the arrow, however, reaching the subject, the shooting of it becomes the efficient cause of responsibility, which, when the arrow takes place, is referred to the act of shooting. In this instance, therefore, there is no difference between the *beginning* and the *end*, the shooting being considered as *murder* alone, and not a *wound*, *fatal in its consequence*; and accordingly, the value of the subject [the slave] is due on behalf of the master.

If the magistrate pronounce upon any person a sentence of lapidation [for whoredom,] and one of the bystanders shoot an arrow at this person, and one of the witnesses then retract from his testimony, and then the arrow take place, the shooter is not responsible for any thing; for regard is here paid to the time of shooting the arrow; and the blood of the person condemned was at that time in a neutral state.

Case of shooting at a condemned criminal, who, in the interim, stands acquitted.

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HEDAYA.

# H E D A Y A.

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## B O O K L.

### Of DEEÀYAT, or FINES.

Definition of  
*Deeàyat.*

**D**EEÀYAT is the plural of *Deyit*, which signifies the fine exacted for any offence upon the person.

Chap. I.    Introductory.

Chap. II.    Of Nuisances placed in the Highway.

Chap. III.    Of Offences committed *by* or *upon* Animals.

Chap. IV. Of Offences committed *by* or *upon* Slaves.

Chap. V. Of Offences committed by usurped Slaves, or Infants, during the Usurpation.

Chap. VI. Of *Kissâmit*, or the administration of Oaths.

## CHAP. I.

IN cases of manslaughter an heavy \* fine is due from the *Akilas* [of the slayer;] and it is incumbent on the slayer to perform expiation.—The expiation for manslaughter (and also for homicide by misadventure) consists in the emancipation of a *Mussulman* slave, (provided, however, that he be free from all personal defects;) or, if such a slave cannot be procured, in observing a fast for two months successively.—With respect to the distribution of *alms*, it does not constitute an expiation in cases of homicide, as in cases of *Zibâr* †; because the above two modes of expiation for homicide are particularly specified in the KORAN, whereas the expiation of *Zibâr* is there mentioned to be sufficiently performed by the distribution of alms, as well as by the other two modes.) It also suffices, for an expiation, that the slayer emancipate an infant at the breast ‡ whose father or mother is a believer, since such infant is a *Mussulman* in effect §,—and its members (such as the hands, feet, eyes, &c.) are all apparently perfect:—but

Manslaughter requires an heavy fine; and the performance of an expiation by the slayer.

\* Arab. *Mogballizé*. It is particularly defined a little further on.

† See Vol. I.

‡ 332.

‡ Arab. *Râzzi*; meaning an infant not yet weaned: a *suckling*.

§ Because an infant is a *Mussulman* in dependance of its parent.

it does not suffice to emancipate an embryo yet in the womb, since its existence, as well as the perfectness of its frame, are unknown and uncertain.

The fine for manslaughter consists of one hundred female camels;

or (when paid in money) of ten thousand *dirms*, or one thousand *deenars*.

THE *heavy* fine for manslaughter consists, according to *Haneefa* and *Aboo Roosaf*, of one hundred female camels, in four lots or classes, namely, twenty-five of one year, twenty-five of two years, twenty-five of three years, and twenty-five of four years. *Mohammed* maintains that it consists of one hundred female camels, in *three* lots; namely, thirty of three years, thirty of four years, and forty (pregnant ones) of five years; because the prophet has said, “*A person who dies of scourging or the bastinado is slain by MANSLAUGHTER\*, which requires an expiation of one hundred camels, forty of them pregnant;*”—and also, because manslaughter requires an *heavy* fine, which the number in question amounts to. The two *Elders*, in support of their opinion, argue that the prophet in general terms ordained one hundred camels to be the mulct for bloodshed;—and with respect to the saying quoted by *Mohammed*, it is of no weight; for the companions have differed concerning the amount of the fine, which would not have been the case had it been established (as it *must*) by that authority. It is to be observed, however, that this aggravation† of the fine for manslaughter holds only where it is paid in camels;—for if the magistrate decree it to be paid in money, no more than ten thousand *dirms*, or one thousand *deenars*, can be imposed in aggravation; because, when paid in this mode, the amount has been particularly specified by the lawgiver.

The fine for homicide by misadventure consists of

IN cases of homicide by misadventure a fine is incumbent upon the *Akilas*, and expiation upon the slayer. The fine, in this instance, consists of one hundred camels in five lots; twenty females of one year,

\* That is, supposing those to be inflicted *unjustly*, or *without authority*.

† Previous to the time of the prophet the fine for bloodshed was only *ten* camels.

twenty

twenty of two years, twenty of three years, twenty of four years, and twenty males of one year; because such was the fine decreed by the prophet in this instance; and also because in this mode the fine is least burthenfome, and an alleviation ought to be granted in a case of *misadventure*, since the shedder of blood there stands excusable.

eighty female  
camels and  
twenty males.

A FINE of gold is one thousand *deenars*, and that of silver ten thousand *dirms*, (as mentioned above.) *Shafei* maintains that the fine of silver is twelve thousand *dirms*. Our doctors, in support of their opinion, quote the authority of *Omar*. In fact, this difference of opinion arises solely from a difference in the *weight* or *rate* of the *dirms* \*.

Difference of  
opinion con-  
cerning the  
rate of a pe-  
cuniary fine.

A FINE is not paid in any other than the above three modes, namely, in camels, *deenars*, or *dirms*. The two disciples maintain that it may be paid not only in these, but also in kine, (two hundred,) or in goats (two thousand,) and also in cloaths, (two hundred suits.) It is also remarked in the *Mabsoot*, under the head of *Fines*, that “if the avenger of blood compound the matter for more than two hundred kine, or two hundred suits of clothes, it is unlawful;” and as no dissent is there noticed on the part of *Haneefa*, it hence follows that he also admits the payment of a fine in clothes or kine, as well as the two disciples.—This is approved.

It is not pay-  
able in any  
other mode  
than by ca-  
mels or cur-  
rent coin.

THE fine for a woman, whether for the *person* or the *members*, is half the fine for a man. *Shafei* maintains that in all cases of offence against the *members* of the body, where the fine is rated at one third of the fine of blood, or less, a man and woman are equal; but that where it *exceeds* a third, up to the complete fine, that for a woman

The fine for a  
woman is half  
the fine for a  
man;

\* The translator omits, in this place, a long and perfectly useless discussion concerning the relative weight and value of *dirms* at different times.

is only in half the proportion. The argument of our doctors is that the prophet has said, "*The fine for a woman is half the fine for a man;*" and as this precept is thus unrestrictedly expressed, it therefore comprehends all cases, and is consequently a sufficient refutation of *Shafei's* opinion. Besides, the *rank* of a woman is lower than that of a man, and so likewise her *faculties* and *uses*; and as an effect of this appears in the fine for a woman's person, (that being only *one half*, according to all authorities,) so in the same manner it is one half for the members, as well as for the person,—and the same in all cases where it exceeds one third of the whole.

and that for a *Zimnee* is the same as for a *Mussulman*.

THE fine for a *Zimnee* is the same as for a *Mussulman*. *Shafei* says that the fine for a *Jew* or a *Christian* is four thousand *dirms*, and for an idolator six hundred. *Malik*, on the other hand, says that the fine for a *Jew* or a *Christian* is half the fine for a *Mussulman*. Our doctors, however, support their opinion upon a saying of the prophet, "*The fine for every ZIMMEE is one thousand DEENARS,*" which precept, being generally expressed, places all upon an equality.

## SECTION.

### Of FINES for Offences not affecting LIFE.

A complete fine is required for the nose, the tongue, or the virile member;

THE cartilage of the nose requires a complete fine; and so likewise the tongue and the virile member; because the prophet has said, "*A fine is due for life, and for the nose, and for the tongue.*" It is, moreover, a rule, with respect to the members of the body, that  
8  
where

where one of the faculties [bodily or mental] is destroyed, or the beauty of the countenance effaced, a complete fine is due; because this is a destruction of the person, in *one* shape, which is held tantamount to a destruction of it in *every* shape, out of respect to MAN.

If the bone of the nose be struck off, together with its cartilage, still a *single* fine only is due, and no more, the whole forming only one member. In the same manner also, if the whole tongue be cut out, a single fine is due, as a desirable faculty (namely, *speech*) is thereby lost. A complete fine is likewise due if a *part* only of the tongue be cut off, provided the power of speech be utterly destroyed, for in this case the most desirable use of the tongue is lost, notwithstanding the *instrument* of speech still remain. Lawyers, however, have remarked that if the person continue to possess the power of pronouncing *some* of the letters, the fine is levied proportionably.—(Some hold that it is in this case to be levied in the proportion which the *dental* letters bear to the rest.)—Lawyers also say that if the person be still capable of pronouncing most of the letters, the fine must be determined by arbitration \*; because the use of speech is to communicate ideas, which end is still answered;—but yet an impediment is occasioned in the utterance, which requires an equitable recompence.—If, on the contrary, the person be rendered incapable of pronouncing most of the letters, a complete fine is due, since here it is evident that the use and intension of speech is not obtained.

and also, for a *part* of the tongue, if the power of speech be destroyed; (or, in proportion as it may be injured;)

If a man hit another a blow upon the head, so as to deprive him of reason, a complete fine is due, as the person is thereby deprived of the power of attending either to his temporal or eternal concerns. So likewise, if a person be by a blow deprived of any of the senses, such

and for a blow which, in its consequence, deprives the person struck of his reason,

\* Arab. *Yawjibo Hakoomit-al-adil*; literally, "an award of equity is due." *Hakoomit-al-adil* (the award of equity) is a technical phrase, which occurs frequently in the sequel, and is sometimes rendered, by the translator, *an arbitratory atonement*.

as



or of any of  
his senses;

as seeing, hearing, smelling, or tasting, a complete fine is due, all these being desirable faculties;—and it is, moreover, related of *Omar*, that he imposed a quadruple fine for a single blow, in a case where it had deprived the person of reason, and of the power of speech, sight, and hearing.

and for the  
beard or the  
hair of the  
scalp.

If a person tear out the beard of another, so as that it never afterwards grows, a complete fine is due, because the beauty of the countenance is hereby effaced; and the same is likewise due for tearing out the hair of the head (so as to prevent its future growth) for the same reason. *Shafei* maintains, that for the hair of the beard or head an arbitrary fine only is due, because those are not an original part of man, but supervenient and excrementitious, inasmuch that in many countries it is customary to cut them off. The argument of our doctors is, that the beard is ornamental to the human countenance, and necessary to its beauty; and as, by the deprivation of it, beauty is consequently effaced, a fine is due for it, in the same manner as for cutting off the cartilage of the ear, and for the same reason;—and so likewise of the hair of the head. With respect to the beard of a *slave*, it is recorded from *Haneefa*, that the penalty for tearing it out is the full value of the slave. According to the *Zahir Rawāyet*, however, nothing more is due than merely the defect occasioned in his value; because the use of a slave is to *work* and perform *service*, which does not require beauty.

(Fine for the  
whiskers

If a person tear out the whiskers of another, so as that they never afterwards grow, an arbitrary atonement is due. This is approved; because, as the whiskers are a dependant of the beard, the tearing them out is therefore subject to the same rule as tearing out a *part* of the beard.

If

IF a person tear out the hair of another's eye-brows, a complete fine is due; and half a fine for tearing out the hair of *one* eye-brow.— According to *Málik* and *Shaf'ei* an arbitratory atonement is due in this instance. The arguments have been recited at large in treating of the beard.

A COMPLETE fine is due for the two eyes, the two hands, the two feet, the two lips, the two ears, and the two testicles;—and for *one* of either an half fine is due; because the prophet wrote a letter to *Omar*, signifying that “*for the two eyes a complete fine is due, and an half fine for one eye;*” and also, because, as by the loss of both the fellow members, in the instances above mentioned, either one of the faculties is destroyed, or beauty is totally effaced, a complete fine is consequently due; and as, by the loss of one of them, an half of the faculty is destroyed, or an *half* of the beauty effaced, an *half* fine is therefore due.

A complete fine is likewise required for any two fellow-parts or fellow-members of the body; and an *half* fine for any *one* of them;

FOR the two breasts of a woman a complete fine is due; and an half fine for one breast, for the reason before mentioned. For the two nipples, also, of a woman's breasts a complete fine is due; and for one of them a half fine; because the faculty of preserving the milk and giving suck is completely destroyed in the former instance; and it is also destroyed in one half in the latter instance.

and the same for the breasts or nipples of a woman;

FOR the four eye-lids a complete fine is due; and for any one of them a quarter of the complete fine; because by the loss of the whole beauty is completely effaced, and a natural advantage is also lost, namely, that of preserving the eyes from external substances. As, therefore, a complete fine is due for the *whole*, being four in number, a quarter of a fine is consequently due for one, an half for two, and three quarters for three;—and it is the same whether the whole eye-lid be taken off, or only the eye-lash and edge of the lid.

and also for the *four* eye-lids.

FOR

A tenth of the fine is required for a toe or a finger;

FOR each of the fingers or toes a tenth of the fine is due; because the prophet has said, "*Ten camels must be paid for a finger*;" and also because, by the loss of all the fingers or toes, one of the faculties (namely, walking or holding) is completely destroyed, for which a complete fine is due; and as the fingers (or toes) are ten each, the fine is therefore divided into ten equal parts, one of which is due for each respectively. It is to be observed that in this respect all the fingers (and toes) are alike, the saying above quoted being unrestrictedly expressed. Besides, all the fingers are alike in their original purpose, in the same manner as the right-hand and the left.

(the fine for the joints of the finger or toe being in proportion to their number.)

IN every finger (or toe) consisting of three joints, a third of the fine for the whole finger is due for each joint; and in every finger of two joints an half of the fine for the finger; for in the same manner as the fine for the two hands is divided among the fingers, so likewise is the fine for each finger divided among its joints.

and a twentieth for a tooth.

THE fine for each tooth is five camels,—that is, a twentieth of the complete fine, the prophet having thus ordained. It is to be observed, moreover, that all the teeth are in this respect alike; because the ordinance here mentioned is absolute; and all the teeth are, moreover, alike in their original purpose, in the same manner as the fingers or toes.—This is where the deprivation has been effected by *misadventure*;—for, where it is *wilful*, retaliation is due in all those instances as has been already mentioned in treating of offences against the person.

An half fine is incurred by the deprivation of the use of a member;

IF a person strike the member of another, so as to destroy the use of it, the member itself still remaining, an half fine is due;—(as in the case, for instance, of causing a person's hand to wither, or blinding an eye;) because the fine is incurred by destroying the use of the member, as well as by a deprivation of the member itself.

IF

If a person strike another on the loins, so as to destroy his power of secreting *semen*, a complete fine is due, this amounting to a complete destruction of one of the faculties.

and a complete fine by the destruction of any of the faculties,

If a person strike another on the back, so as to make him crooked, [back-broken,] a complete fine is due, as the beauty of the person is thus completely destroyed. If, however, the person afterwards recover his carriage, so as to retain no sign of the injury, nothing whatever is incurred.

or of the beauty of the person.

## SECTION.

Of SHADJA, or Wounds and Cuts from the Crown of the Head to the Chin.

(*Malik* maintains that the cheek bones are not included in the face, as they do not form a part of what is properly termed the *visage*. Our doctors, however, include them in the face, both as they are annexed to it, and also because they, in fact, constitute a part of the whole countenance.)

Of *Shadja* wounds there are ten: I. *Hārījā*; or a scratch, such as does not draw blood: II. *Dāmīā*; or a scratch, such as draws blood, but without causing it to flow: III. *Dameedā*; or a scratch, such as causes the blood to flow: IV. *Bāziā*; or a cut through the skin: V. *Motābmilā*; or a cut into the flesh: VI. *Simbāk*; or a wound reaching to the pericranium: VII. *Māwziḥā*; or a wound which lays bare the bone: VIII. *Hāshimā*; a fracture of the skull: IX. *Moonāk-kilā*;

*Shadja* wounds are of ten descriptions.

*kilá*; a fracture which requires a part of the skull to be removed: X. *Ammá*; or a wound extending to the membrane which incloses the brain.—Next follows *Dàmighá*, or a wound which penetrates to the brain; which, however, is not included among the others, as a person so wounded cannot possibly continue alive.

Retaliation is inflicted only in the case of a cut (wilfully given) which lays bare the bone.

IN the case of a wound of the *seventh* description [*Màwzihá*] retaliation is due, provided the wound was wilfully given; because it is recorded of the prophet that he decreed retaliation for such a wound; and also, because it is here practicable to observe an equality in the retaliation, since it is possible to cut the offender to the bone with a knife. Retaliation is therefore due in this instance;—but it is not to be inflicted in any of the other cases above described, as in those there is no determinate limit to which to cut with a knife; and besides, in all wounds *above* the seventh description the bone is fractured; and there is no retaliation for fractures. In wounds short of the seventh description an award of equity is due, as those have no specific limit, and yet cannot lawfully be suffered to pass without penalty.

Rate of fines for *Shàdja* wounds when given by *misadventure*.

IN the case of a *Màwzihá* wound inflicted by *misadventure*, a twentieth of the complete fine is due. For a *Hàshimá* wound a tenth of the complete fine is due; for a *Moonaàkkilá* three twentieths; and for an *Ammá* a third;—whether they be inflicted wilfully or accidentally. (A third of the fine is also due for a *Jàifá*, or stab,—that is, a wound penetrating into the cavity of the trunk, from the breast, the back, the belly, or the ribs, or from the neck into the gullet;—and if it penetrate quite through, from side to side, it is accounted as *two* stabs, and two thirds of the fine are accordingly due for it; because the prophet has said, “*Five camels are due for a MAWZIHA wound, ten for a HASHIMA, fifteen for a MOONAKKILA, and a third of the complete fine for an AMMA and a JAIFA*;” and also, because where the wound extends *quite through*, it stands, in effect, as two stabs,  
one

one on one side, and one on the other; and as a third of the fine is due for each stab, it follows that *two* thirds are due in this instance.)

THE ten descriptions of wounds here treated of are restricted solely to the *head* and *face*, as has been already mentioned. With respect to wounds on the other parts of the body, which are termed *ʃiràbit*, and for which no specific mulcts have been appointed, they require an arbitrary atonement, where the bone is either fractured or laid bare, provided a lasting scar or deformity be occasioned; because although specific mulcts have been appointed only for wounds of the head or face, yet the offences in question cannot lawfully be suffered to pass without penalty; and also, because the particular appointment of a mulct is on account of the defect occasioned by a scar, which is a defect only where it occurs upon the head, or in the face. With respect to the arbitrary atonement to be awarded in this instance there is a difference of opinion. *Tabàvee* says that it is to be determined by the difference between the value which the wounded person would bear (supposing him to be a slave) *without* the scar, and that which he bears *with* the scar; and if the difference be equal to a twentieth of the former value, a twentieth of the fine must be awarded; if a tenth, a tenth of the fine; and so forth. (Decrees pass according to this.) *Koorokbee*, on the contrary, says that the atonement must be adjusted by the proportion which the wound in question bears to a *Màwzibá* wound;—in other words, if it amount to an *half* of a *Màwzibá* wound, the half of a *Màwzibá* fine is due; if to a quarter, a quarter is due; and so forth. This, however, is rejected, as it is scarcely possible thus to measure the wound.

All other wounds are compensated for by an arbitrary atonement.

Mode of determining such atonement.

## SECTION.

An half fine  
is due for all  
the fingers of  
either hand;

and no more,  
although a  
part of the  
hand be  
struck off;

FOR the fingers of one hand an half of the complete fine is due; because, as the fine for each finger is a tenth, (as has been before mentioned,) it follows that for five of them the fine is five tenths; and also because, as for cutting off *all* the fingers, one of the faculties being thereby destroyed, (namely, that of carrying,) a complete fine is due, so in like manner, half the faculty being destroyed by cutting off the fingers of one hand, an half fine is consequently due. If, also, the fingers of one hand be cut off, together with a part of the *metacarpus*, still an *half* fine only is due; because the prophet has said, “*for the two hands a fine is due, and HALF the fine for one hand;*” and also, because the *metacarpus* is merely a dependant of the fingers, as it is upon the latter solely that the power and faculty of *carrying* or *taking hold* of any thing depends.

but if a part  
of the lower  
arm be struck  
off, an arbitrary atone-  
ment is also  
due.

If the hand be struck off, together with a part of the lower arm, an half fine is due for the hand, and an arbitrary atonement for the part of the arm, according to *Haneefa* and *Mohammed*, and also according to one opinion of *Abou Yoosaf*. There is another opinion recorded from him, that any thing beyond the hand or foot, to the shoulder or the hip, is merely a dependant; and that nothing whatever is incurred for the leg or arm; as the LAW has appointed an half fine for a *hand*, [*Yed*,] which signifies the whole limb up to the shoulder, whence nothing more can legally be imposed. The arguments of *Haneefa* and *Mohammed* upon this point are twofold.—FIRST, the hand is the instrument of seizing and carrying; and as those acts depend upon the hand and fingers, not upon the arm, the latter therefore

therefore is not a dependant of the former with respect to compensation.—SECONDLY, the *band* intervenes between the fingers and the arm,—whence the arm cannot be considered as a dependant of the fingers;—neither is it a dependant of the hand, as that is itself a dependant of the fingers, and a dependant cannot have a secondary dependant.

IF a hand be struck off having only one finger, a tenth of the fine is due; or, if it have two fingers, a fifth; and so forth; and nothing whatever is due for the *metacarpus* in either case\*; because the fingers are the original, and the *metacarpus* the dependant, not only in reality, but also in the eye of the LAW;—in *reality*, as the power of seizing and carrying depends upon the fingers; and also in the eye of the LAW, because that has appointed a fine for the *fingers*, not for the *metacarpal* part of the hand.

For a defective hand a fine is due in proportion to its defect.

FOR a redundant finger (that is, a *sixth*) an award of equity is due, out of respect to MAN; for that also is a part of the person, although it be neither useful nor ornamental. The same rule also obtains with respect to a redundant tooth; and for the same reason.

An award of equity is due for a redundant finger;

AN award of equity is due for the eye, the yard, or the tongue of an infant so young as that the perfectness of these members in him cannot be ascertained. *Shafei* maintains that a complete fine is due for those, in the same manner as for the cartilage of the nose of an infant, or the ear, the perfectness of them being the most probable conclusion. The argument of our doctors is, that the chief end of the organs in question is the *use* of them; and therefore, where their usefulness cannot be ascertained, the fine for them is not due, because of a doubt. Besides, mere *probability* is not a sufficient ground on

and also for the eye, yard, or tongue of an infant.

\* An objection by *Mohammed* is here omitted, as being utterly frivolous and nugatory.



which to advance a claim. It is otherwise with respect to the cartilaginous part of a nose or an ear; for the chief end of that is beauty, which by the deprivation of it is completely destroyed. It is to be observed that the perfectness of the tongue is known from speaking, that of the yard by the proper ejection of urine, and that of the eye from such signs as serve to manifest that the child sees objects with it. As soon, therefore, as from these tokens the perfectness of the organs in question is ascertained, the same rules obtain with respect to them as in the case of adults.

Retaliation cannot be inflicted for any injury upon the head, of an indeterminate nature;

IF a man, either wilfully or by misadventure, give another a wound upon the head, and he be in consequence deprived of his reason, or lose the whole of his hair, retaliation is not due upon the striker:—not in the case of misadventure, evidently; nor in the case of a *wilful* wound, because equality, in a case of this nature, cannot be observed in the infliction of the retaliation. A complete fine is therefore due in either instance, and the mulct for the wound is therein included:—in the instance of loss of reason,—because, as all the faculties of the body are thereby rendered null, the case is therefore, in effect, the same as where a person gives another a wound upon the head, and the wounded person dies,—in which instance the mulct for the cut is included in the fine,—and so here likewise;—and in the instance of the loss of the hair,—because the mulct for a wound upon the head is due solely on account of its occasioning a defect, by the destruction of a *part* of the hair, (inasmuch that if the hair grow again, as it was before, the mulct is remitted;) and as the complete fine is here due in consequence of the loss of *all* the hair, the mulct due for the wound is therein included, as being the least of the two. The mulct is therefore included in the complete fine due on account of the hair, which is the greatest of the two; for it is a rule that where an offence is committed upon any one member, and two injuries are thereby sustained, and the mulct for the one injury is greater than for the other, the smaller is included in the greater;—as where, for instance, a person cuts off the finger of another,

another, and the whole hand is thereby rendered powerless; in which case a fine for the hand is due, including the fine for the finger.

If a person wound another upon the head, and thereby deprive him of speech, sight, or hearing, in this case the mulct for the wound is due, together with the complete fine. The reason of this is, that each of those privations is a separate offence; and as the advantage of each respective organ is restricted to that organ, each is, therefore, like a separate member, such as the hand and foot:— It is otherwise with the *reasoning* faculty, that extending to and affecting all the organs, as has been already explained. *Abou Yoosaf* maintains that the mulct for the wound is included in the fine, in the case of a privation of *hearing* or *speech*, but not of *sight*; because, as the power of hearing or speaking is, like the *reason*, a matter of a concealed nature, it is therefore subject to the same rule; whereas the power of seeing, on the contrary, is evident, and not of a concealed nature, and therefore bears no analogy to reason in this particular. The former opinion is approved.

but the mulct for the wound is due, over and above the complete fine where any of the senses or faculties are destroyed in consequence.

It is recorded, in the *Jama Sagheer*, as an opinion of *Haneefa*, that if a man wilfully wound another upon the head, and thereby put out both his eyes, retaliation is not to be inflicted; and lawyers have, moreover, delivered it as his opinion, that in this instance a fine is due for the eyes, and also the mulct for the wound. The two disciples, on the contrary, hold that retaliation is due for the wound, and a fine for the eyes; for as the act took place upon two different parts or subjects, it therefore amounts to two separate offences; nor does the apprehension of misadventure with respect to the eyes occasion a remission of retaliation for the wound; in the same manner as where a person wilfully shoots an arrow at another, which passing through him hits a second person, and they both

Case of a blow on the head, occasioning the loss of sight.

both die; in which case retaliation is due for the first, and a fine for the second. The arguments in support of the doctrine of *Haneefa* upon this subject are twofold.—FIRST, the wound has communicated an additional consequence. Now the penalty to be inflicted for any thing must be the same as the thing itself: but that is here impossible, it not being in the power of men to inflict a wound upon the head in such a way as to be attended with the same precise effect as the wound in the present instance. A fine is therefore due for both injuries respectively.—SECONDLY, the act is undoubtedly one; and the subjects of it are also one, in one shape, as being conjunct. The apprehension of misadventure, therefore, with respect to the eyes, in the second instance, is extended also to the *first* instance,—that is, to the wound; and consequently occasions a remission of retaliation with respect to that likewise. It is otherwise in the case of shooting an arrow; for there the wound [received by the first person] cannot with propriety be said to have *communicated an additional consequence*\*; and the subjects are, moreover, totally distinct and separate. It is also otherwise where a person cuts off the finger of another, and the knife slips, and hitting another finger, cuts off that likewise; for in this case retaliation is due for the first finger, and a fine for the second, as they are two different subjects.

If a member perish in consequence of a partial injury, retaliation is not incurred, but fine.

If a person strike off the upper joint of another's finger, and the rest of the finger, or the hand itself, wither in consequence, retaliation is not due, nor any thing except the fine for the joint, and an arbitrary atonement for the remainder. In the same manner, if a person break off a part of another's tooth, and the rest of the tooth

\* The term by which this is expressed in the original [*Sirrāyat*] will not bear a literal translation.—In its primitive sense it signifies to *pass* or *penetrate*, and also to *communicate*, (as a contagion or pestilence.) This exposition will suffice to explain the meaning of the phrase.—Where it occurs with a relation to *life* the translator uniformly renders it "*prove fatal*."

turn.

turn black, retaliation is not due, but he must pay the fine for the tooth. If, also, in either of those cases, the injured person require retaliation, offering to be satisfied with striking off the correspondent upper joint of the offender's finger, or a part of his tooth, and to remit the remainder, it is not permitted, those acts not being proper subjects of retaliation.

IF a man strike off the finger of another, and the next finger become powerless in consequence, retaliation is not to be inflicted for either, according to *Haneefa*. *Mohammed* and *Ziffer*, on the contrary, maintain that retaliation is due for the first finger, and a fine for the second. The arguments on both sides have been already recited. *Ibn Simmaia* reports, from *Mohammed*, that if a person give another a wound upon the head, and deprive him of sight in consequence, retaliation is to be inflicted for both the wound and the eyesight,—the offender, where his offence communicates an additional consequence, being accounted a perpetrator with respect also to the secondary or occasional effect thus produced;—in the same manner as where a wound is attended with loss of life; in which case the wounder, being accounted a murderer, is liable to retaliation. In the case in question, therefore, as the wound in the head is attended with loss of sight, the wounder is accounted the perpetrator, or immediate occasion of such privation; and as sight is a subject of retaliation, retaliation by a deprivation of sight must therefore be inflicted. It is otherwise where a person strikes off another's finger, and the next finger becomes powerless in consequence; for a paralytic affection cannot occasion retaliation. From this report of *Ibn Simmaia* it appears that, according to *Mohammed*, if a wound extend, in its effects, to any thing for which retaliation is practicable, it must be inflicted, in the same manner as where a wound, unrightfully inflicted, is attended with loss of life. The reason for the more commonly received opinion above set forth, (that retaliation is not inflicted for the eyesight, when occasioned by a wound on the head,) is that the loss of

Case of an injury to one member occasioning the loss of another.

fight, in the instance in question, occurs merely in an *adventitious* way; in other words, the act, in the first instance, proceeded from the offender, and then occasioned the loss of sight. In the case, moreover, of wounds communicating an additional injury, it is a rule that, if the legal effect\* of the first injury still remain, the second injury is regarded merely as being *occasional*; whereas if, on the contrary, no legal effect remain, it is considered as an immediate consequence of the offender's act. As, therefore, in the case in question, the legal effect of the wound still remains, it [the wound] is consequently regarded as the intermediate cause of the loss of the eye-sight, in the same manner as the digging of a well in the highway is the intermediate cause of homicide;—and retaliation is not inflicted in the instance of an intermediate cause. It is otherwise where a wound is attended with the loss of life, for as, in that case, the legal effect of the first injury no longer remains, the second injury is therefore considered as an immediate consequence of the offender's act.

Retaliation is not incurred where the injury received produces any additional and unexpected defect.

If part of a tooth be broken off, and the remainder afterwards fall out, retaliation is not due;—and in the same manner, if a person give another two wounds upon the head, and the two wounds afterwards become one, retaliation is not due, *Ibn Simmaie* holds that it is due in both instances.

Cases of injury to the teeth.

If a person strike out another's tooth, and a second tooth grow in its place, the fine for the first tooth is remitted, according to *Haneefa*; for here the offence in effect no longer remains, as the use and ornament both continue; and the case is therefore the same as if nothing whatever had been destroyed,—this being analogous to where a

\* Meaning, the liability of the offender to fine or retaliation.

person strikes out the tooth of an infant, which grows again, in which instance no fine whatever is incurred.

If a person strike out another's tooth, and this person keep the tooth in its place until the gum grow round it, and it remain, after all, unlike to the rest in point of usefulness or beauty, a fine for the tooth is due from the striker, the growing of the gum round it not being regarded, since it is impossible that the vessels and nerve of the tooth should be connected with it in the same manner as before.

If a person strike out another's tooth, and this person draw a tooth of the striker, in retaliation, and afterwards obtain, by growth, a new tooth, he in that case owes the striker five hundred *dirms*, as it then becomes evident that he executed the retaliation unjustly, since it is the *destruction of the root* [the renovating power] which, in the case of a tooth, gives cause for retaliation; but here it appears that the root still remains, for if it did not, the tooth could not possibly grow again. In the case in question, therefore, the offence no longer remains, but is utterly done away.—(It is for the reason here alleged that, in executing retaliation for a tooth, a delay is observed of one year, according to all our doctors.)—Retaliation, however, cannot be executed upon the unjust exactor of it in return, because of a doubt; and consequently a pecuniary recompence is due from him.

If a person strike another upon the mouth; so as to loosen his teeth, a delay of a year must be observed, (as mentioned above,) in order to ascertain the effect. If, therefore, the *Kāzee* appoint a year's delay, and the person who was struck appear before him without his teeth, previous to the expiration of the year, and the plaintiff and defendant disagree,—the former asserting that his teeth fell out in consequence of the blow he had received from him [the defendant,] and the

If they be loosened by a blow, a delay of one year must be granted before passing judgment,

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latter affirming that they fell out in consequence of a subsequent blow received from another,—the assertion of the plaintiff, upon oath, must be credited, in order that the advantage of fixing a term of delay may be maintained. It is otherwise where the parties differ after the expiration of the year; for in that case the oath of the striker must be credited.

which, at the expiration of that term, must be passed according to the event.

If, in the above case, the year of delay appointed by the *Khatee* expire, and the teeth do not fall out, nothing whatever is due from the striker. If, on the other hand, the teeth turn black, or decay, a fine for them is due,—from the *Akilas* in a case of misadventure, or from the striker in a wilful case:—but retaliation is not due, as equality cannot possibly be observed in the infliction of it, since it is not in the power of man to hit the teeth of the striker so as to produce the same precise effect upon them;—and for the same reason, if a person break off part of another's tooth, and the rest of the tooth turn black, retaliation is not to be inflicted.

There is no fine for a cut on the head which afterwards heals without leaving a scar;

If a person give another a cut upon the head, and the cut heal, and the hair grow upon the place, so that no mark of it remains, the fine is remitted, according to *Haneefa*, as the defect which would have occasioned the fine no longer exists. *Abou Yoosaf* holds that the striker still owes a fine for the pain of the wound; because, notwithstanding the mark of the injury be effaced, yet the pain has been sustained, and that requires a recompence. *Mohammed*, on the other hand, maintains that the striker is liable merely for the expence of the surgeon; for as the wounded person has been subjected, by the act of the striker, only to the hire of the surgeon, and the price of his remedies, the case is therefore the same as if the offender had taken, and destroyed so much of the wounded person's property. *Haneefa* says that the award for the pain, as mentioned above, can only be determined by considering for how much a person might undertake to bear such

such a degree of pain, supposing it possible that a man were hired solely for the purpose of bearing pain. The award, therefore, for the pain is opposed to the trouble sustained in bearing it. Now trouble is not valuable but under a contract of hire, either valid or invalid; and as no such contract exists on the part of the offender, it follows that no value can be set upon the trouble of the wounded person in bearing the pain occasioned by the offence; and consequently, that the offender owes nothing on that account;—in the same manner as where a person strikes another a blow with his fist, and puts him in pain; in which case nothing whatever is due; and so here likewise. With respect, moreover, to the fee of the surgeon, the wounded person has paid it at his own discretion, and therefore the offender is not liable for it.

If a person give another one hundred stripes (for instance), and thereby cut him, and the person so cut recover, in this case a fine is due for the stripes, provided they leave a mark; but if they do not leave a mark, the fine is remitted. *Abou Yoosaf* maintains that a fine is due for the pain inflicted. *Mohammed*, on the other hand, alleges that the offender must pay the expence of a surgeon. The fine for stripes is to be determined by observing the proportion which the wounds they occasion bear to those for which a fine is appointed.—If, therefore, they be in the degree of one half, an half of the appointed fine for a wound is due; if, of one third, a third of the fine is due; and so forth.

nor for stripes which heal without leaving marks.

If a person strike off the hand of another by misadventure, and then, before he has recovered, slay him by misadventure, he owes a complete fine; and the fine for the hand is remitted; because both offences are of one species or description, namely, *by misadventure*; and the award for both is the same, namely, a fine; and as the consideration for the person is also a consideration for all its parts, it follows that the fine for the member is included in the fine for the whole

A person killing another by misadventure, after having maimed him, incurs only one fine.



whole man, whence the case is the same as if he had slain him at the first.

Retaliation is not inflicted for a wound, until after the wounded person's recovery.

If a person [wilfully] wound another, retaliation must not be inflicted until the wounded person shall have recovered; because the prophet has said, "*In the case of wounds a delay must be observed for one year;*" and also, because regard is paid to the ultimate consequence of a wound, as the award for it is at present unknown, since it is possible that it may prove fatal, and consequently that the act may prove to be murder. The award, therefore, for a wound is not fixed until it be healed.

The fine for wilful offences, and compositions for offences, are to be discharged by the offender.

IN all wilful offences, where retaliation is remitted because of a doubt, a fine is due from the property of the offender; and all compositions for offence, also, fall upon the property of the offender;—for the prophet has said, "*The AKILAS are not to pay the fine for a wilful offence, nor the fine of a slave, nor a composition for offence, nor a fine incurred by acknowledgment, nor any thing short of the fine for a MAWZIHA wound.*"—It is to be observed, however, that in the first of the above cases (where retaliation is remitted because of a doubt) the fine is payable in three years; for as the offence, in this instance, is analogous to manslaughter or homicide by misadventure, because of the doubt, the same delay is therefore granted in the payment of the fine. In the case of composition, on the contrary, it is due upon the instant, being rendered obligatory by a particular contract, in the same manner as the price of the goods in a contract of sale.

A father murdering his son incurs a fine payable in three years.

If a father wilfully murder his son, a fine is due from his property, payable in three years. *Shaf'ii* maintains that it is payable upon the instant. The argument of our doctors is, that in all cases of offence the LAW has granted a delay in the payment of the fine; and the precepts of the LAW are not to be set aside, especially to countenance

tenance an aggravation, which the immediate sanction of the fine would amount to.

THE fine for any offence established upon the acknowledgment of the offender, is due from his property, his acknowledgment not being regarded with respect to his *Akilas*; because of the saying of the prophet before quoted, and also because the effect of an acknowledgment cannot extend beyond the acknowledger himself, (he having no authority over others,) and therefore does not affect his *Akilas*.

A fine incurred in consequence of acknowledgment must be paid by the acknowledger.

WILFUL murder committed by an infant, a lunatic, or a person occasionally insane, [*Matood*,] being the same as homicide by misadventure, the fine for it is due from the *Akilas*, and so likewise every other fine incurred by such persons to the amount of five hundred *dinars* and upwards. *Shaf'ei* says that wilful murder by those persons comes under the construction of *wilful*, inasmuch that the fine for it is due from the property of the perpetrator; because the act was wilful undoubtedly, as the term *wilful* applies to any thing done by intention and with design; and retaliation is remitted in this instance solely because persons of the above description are not liable to any corporal infliction,—which argument, however, does not apply to their property, whence it is that expiation is required of them. The arguments of our doctors upon this point are twofold.—FIRST, it is recorded of *Ali* that he once decreed the fine incurred by a lunatic to be paid by his *Akilas*.—SECONDLY, an infant or lunatic is an object of compassion; and as an adult, or a sane person, is entitled to an alleviation, inasmuch that his fine is paid by his *Akilas*, it follows that those are likewise entitled to an alleviation *a fortiori*. With respect, moreover, to what *Shaf'ei* says, that “their act is *wilful*,” it is not admitted; for will depends upon knowledge; and knowledge depends upon reason, which in a lunatic is altogether wanting, and in

Wilful murder, by an infant or lunatic, requires a fine, payable by their *Akilas*.

in an infant is defective. Neither are they (as he alleges) required to make expiation; because that is performed to cover a crime; and in the present instance there is no crime to be covered, as they are held incapable of committing a crime.

## SECTION.

### Of EMBRYOS in the WOMB.

A person striking a woman so as to occasion her miscarriage (of a free begotten foetus) incurs a twentieth of the complete fine [a *Ghorra*,]

If a man strike a pregnant woman upon the belly, so as to cause her to miscarry of either a male or female foetus, begotten free, a *Ghorra*\* being a twentieth of the complete fine for a man, namely, five hundred *dirms*, is due, upon a favourable construction. Analogy would suggest that nothing whatever is due from the striker in this instance; because the living existence of a foetus is not a matter of certainty, and mere probability is not an admissible ground of claim. The reason, however, for a more favourable construction of the LAW in this particular is, that the prophet has said, "*A GHORRA is due for a foetus*;" and by a *Ghorra* is understood a male or female slave, of the value of five hundred *dirms*.

of which his *Akilas* are to pay their part;

THE *Akilas* of the striker, in the above instance, are to pay their part of the fine [the *Ghorra*] according to our doctors. *Malik* maintains that it is solely due from the property of the striker; because it

\* This is a technical term, expressive of a fine of five hundred *dirms*,—derived from the appellation generally given in *Arabia* to an infant male or female slave of that value.

is paid in compensation for a part of the body; for a foetus is a part of the mother; and a compensation for a part of the body, like the compensation for a *finger* (for instance,) is due from the property of the offender. The arguments of our doctors are twofold.—FIRST, a precept of the prophet, who once decreed a *Gborrá* to be paid by the *Akilas*.—SECONDLY, the *Gborrá* is a compensation for the person, (of the foetus,) not for a part of the body;—whence it is that the prophet denominated it a *fine*.

THE *Gborrá* is payable within a year. *Shaféi* says that it is payable in three years; because it is a compensation for the person, and accordingly is distributed among the heirs of the foetus. The arguments of our doctors upon this point are twofold.—FIRST, It is recorded, in the traditions, that the prophet, upon a certain occasion, decreed a *Gborrá* to be paid by the *Akilas* within the year.—SECONDLY, the *Gborrá* is a compensation for the *person*, considering the embryo as a separate existence; but it is also a compensation for a part of the body, considering the embryo as connected with the mother. Now we pay attention to both considerations; and accordingly, we adjudge the inheritance [of the fine among the embryo's heirs] on the *first* consideration, and on the second consideration adjudge the term of one year for the payment,—the compensation for a part of the body, where it falls short of the complete fine, being invariably payable within a year. It is otherwise with respect to parts or divisions of the fine; for any part thereof due from any person is payable in three years \*.

and it is payable within a year:

If a person strike a woman upon the belly, and she in consequence bring forth a living child which afterwards dies, a complete

but if she produce a living child,

\* The *Gborrá* is not considered merely as a *proportion of the fine*, but is a distinct and separate species of fine, imposed solely in the case of *embryos*.

which afterwards dies, he owes a complete fine.

fine is due from the striker, as he, by striking the mother, has produced the destruction of a living person.

If the woman so struck miscarry of a dead foetus, and also die herself, the striker is accountable both for a complete fine, and a *Gborrá*.

If a person strike a woman on the belly, and she in consequence miscarry of a dead foetus, and afterwards die, the striker owes a fine for the murder of the mother, and a *Gborrá* on account of the miscarriage,—the prophet having so decreed in such an instance.—If, on the contrary, the mother first die of the blow, producing a living child which afterwards dies likewise, the striker owes one fine on account of the mother, and another on account of the child, as having here murdered two people. If, on the other hand, the mother die of the blow, producing a dead child, a fine is due for the mother, but nothing whatever for the child. *Shaféi* maintains that, in this case a *Gborrá* is due on account of the dead child; for, as the death of the child has been, to all appearance, occasioned by the blow, the case is therefore the same as if the mother had produced a dead child whilst she was yet alive. The argument of our doctors is, that it may have been the death of the mother which produced that of the child, as an embryo must necessarily perish where the mother dies, since the life of the one is derived from that of the other:—hence it is doubtful whether the death of the child was occasioned by that of the mother, or by the blow; and there is no responsibility in any case of doubt.

The striker cannot inherit any part of the *Gborrá*.

THE fine or penalty incurred on account of an embryo goes as an inheritance to the embryo's heirs, as being a compensation for his person. The striker \*, however, cannot have any share in such inheritance. If, therefore, a man strike his wife on the belly, so as to cause her to miscarry of a dead child, of his begetting, his [the father's] *Akílas* are responsible for a *Gborrá*, of which he cannot inherit

\* Meaning, the person who struck the mother, and thereby occasioned the miscarriage.

any part; because he has slain the child unrightfully, and is therefore guilty of murder; and there is no inheritance for a murderer.

If a person strike upon the belly a pregnant female slave, whose pregnancy has proceeded from some other than her master, and she, in consequence, miscarry of a dead foetus, but herself remain alive, the value of the foetus must in this case be estimated at the same rate as if it were alive. If, therefore, it be a male foetus, a twentieth of the value is due; or, if a female, a tenth. *Shaf'ei* maintains that the striker is liable for a tenth of the value of the mother; because, as the embryo is, in one view, a part of the mother, the rate of compensation is therefore determined by the value of the mother, who is the original,—the rate of responsibility for a part being always determined by the rate of the original. The argument of our doctors is that a *Ghorra* is a compensation for the person, not for a part or member of the body;—for a compensation for a part or member is not due unless some noticeable defect be occasioned in the original; (inasmuch that if there be no defect occasioned in the original, nothing whatever is due;—as where, for instance, a person strikes out the tooth of another, and a second tooth grows in its place,—in which case the striker is not liable for any thing;)—and in the case in question the defect occasioned in the original (namely, the mother) is of no account, since a responsibility attaches for the embryo whether a defect have been occasioned in the mother or not. As, therefore, the *Ghorra* is evidently a consideration for the person, and not for any part or member, the rate of it is to be determined by the consideration for the person. Now, in estimating the consideration for the person, the original thing is the person of a freeman; and the rate for the person of a free-begotten embryo, if it be a male, is a twentieth of the fine for a man, or, if a female, the tenth of the fine for a woman;—whence the same rule holds with respect to the embryo produced from a female slave. As, however, the value, in the case of a slave, is a substitute for the fine, in the case of a freeman, the striker therefore owes a twentieth of the value of the embryo, if it

Cases of miscarriage occasioned with respect to female slaves.

be a male, or the tenth, if it be a female; *Abu Roefaf* maintains that the striker is responsible for any damage which the mother may have sustained, in the same manner as holds in the case of animals,—the responsibility for a slave being (according to his tenets) a responsibility for property, as shall be presently explained.

If a person strike a pregnant female slave upon the belly, and her master afterwards emancipate “whatever may be in her womb,” and she then miscarry of a living child, which shortly after dies, the value of it, as a living child, is due, and not the *fine*, notwithstanding it died after manumission; for the offender is accounted to have killed the child by a blow given to the mother at a time when it was still a slave.

Expiation is not required for the destruction of an embryo.

EXPIATION is not due for an offence committed upon an embryo: *Shafei* maintains that expiation is due in this instance; for an embryo is, in one view, a personal entity\*; and as, in the case of a personal entity, life is most probable, an expiation must therefore be performed, out of caution. The argument of our doctors is that expiation is a sort of penal infliction, as it has been ordained for the purpose of determent. Now determent applies solely to the *perfect man*†; not to any other subject; and an embryo is not a *perfect man*; for if it were so, a complete fine would be due. Our doctors, however, remark that if the striker be desirous of performing expiation, it is lawful; for as he has been guilty of a prohibited act, it is consequently most laudable that he perform expiation and intreat forgiveness. It is to be observed that a foetus not yet perfectly formed is the same as a perfect embryo with respect to all the rules concerning embryos;—because the

\* Arab. *Zdt*.—Literally, a *self*; meaning, a distinct and separate being. The English language does not afford any term precisely corresponding with it.—(For a further explanation of it, see the preceding book, p. 276.)

† Arab. *Zat Kamil*; literally, a *perfect self* or *person*.

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### Of Nuisances placed in the Highway.

**Buildings or timbers placed in or projecting over the highway may be removed by any person whatever.**



and repassing, it follows that, provided there be no injury sustained, the obstructing him in the enjoyment would be vexations. But if they be injurious to the community, the use of them is abominable.

They cannot be erected or set up in a closed lane without the consent of the inhabitants.

It is not lawful for an inhabitant of a lane shut up at one end to construct in it a bath, set out a spout, or so forth, without the consent of the other inhabitants, whether it be injurious to them or otherwise; for as the lane is, in fact, their property, (whence it is that the right of *Shaffe* with respect to the houses in it appertains equally to them all,) their acquiescence is therefore indispensable. In a public road, moreover, the conversion to particular use is lawful to all men indiscriminately; excepting only in instances where it may prove detrimental; for as it is impossible to obtain the acquiescence of every individual of the community, each is therefore accounted a proprietor, lest his right of use should be altogether defeated:—but it is not so in a closed lane; for as it is practicable to obtain the acquiescence of all the inhabitants of the lane, the privileges of partnership therefore hold good, both actually and virtually, with respect to each individual of them.

A person erecting a building, &c. in the highway incurs a fine for any person

If a person erect a building in the public highway, as before mentioned, and it happen to fall upon and destroy any one, a fine is due from the *Akiles* of the person in question; because he was the occasion of the destruction, and was guilty of a transgression in having erected a building in such a situation; and a person who occasions a destruction is responsible where he has in any respect transgressed, as in the case of digging a well in the highroad. The same rule also obtains where the building falls upon and thus destroys a man or an animal.

(or number of persons) it may occasion

If a man stumble over the ruins of such building, and fall upon another man, and they both die, the person who erected it is responsible

the destruc-  
tion of.

**Case of death  
occasioned by  
the fall of a  
spout.**

A person having fixed up a nuisance upon his house, is responsible for any damage it may occasion even after he has sold the house.

If a person construct a balcony, projecting from his house, and then sell the house, and the balcony afterwards fall upon any person and destroy him,—or, if a person set up a piece of timber in the middle of the highway, and afterwards sell it, and deliver it to the purchaser, and he [the purchaser] declare him acquitted of all accidents which may happen from it, and leave it there until it fall and kill some person,—the seller is responsible in both instances, and nothing whatever falls upon the purchaser; because the act of the seller (in constructing the balcony, or setting up the timber) is not done away by the extinction of his property; and as such act occasions responsibility, he is responsible accordingly, and not the purchaser, who has not done any act to occasion responsibility.

A person laying fire in the highway is responsible for any thing which may be burnt in consequence.

If a person lay fire in the highway, and any thing be burnt in consequence, he, as having transgressed, is responsible for the damage. If, however, after the fire being thus laid in the highway, the wind should blow it to another place, and any thing be burnt in consequence, he is not responsible, as by the wind carrying off the fire his act is done away. Some, indeed, say that if the fire was laid in the highway at a time when the wind was high, he is responsible; because he laid the fire there, notwithstanding his knowledge of the probable consequence; and therefore the act of the wind, in carrying it off, is in effect the same as if he had himself carried it to the place which was burnt.

Workmen constructing a nuisance are responsible for any accident it may occasion before their work be finished.

If a person hire workmen for the purpose of constructing a balcony, or a penthouse, and such balcony or penthouse fall upon and kill a man before the workmen had finished it, the responsibility falls entirely upon the workmen; for the deceased was destroyed in consequence of their act; and so long as they continue engaged in the work, the balcony or penthouse is not held to be delivered to their employer. Their act is therefore construed into homicide, inasmuch that

that they must perform an expiation for it. Besides, as their employer did not hire them to *kill* any person, but to construct an erection, the accident has therefore no relation to the contract of hire; but attaches to the workmen alone, whence the damage also attaches solely to them, as being a consequence of their act. If, on the contrary, the balcony or penthouse in question fall after the work is finished, the owner of the house is responsible, on a favourable construction; for in this case the contract of hire has been completely fulfilled, inasmuch that the workmen have become entitled to their wages. Their act has therefore devolved upon their employer, who consequently stands in the same predicament as if he had himself performed the work; and he is responsible accordingly.

If a person spill water on the highway, either purposely, or by performing his ablutions there, and a man or animal perish in consequence, a fine for the man is due from the person's *Akilat*, or a compensation for the animal from the person himself; because he has been guilty of a transgression, injurious in its consequences to the passengers upon the road. It is otherwise where water is spilled in a closed lane by one of the inhabitants, and a man or animal perishes in consequence; or, where an inhabitant of such a lane sets down any thing in the middle of it, and a man or animal falls over the same, and so perishes; for in none of these cases does responsibility attach to him, as any inhabitant of a closed lane is entitled, in virtue of his residence, to perform these acts in such lane, in the same manner as in a partnership house. Lawyers remark that what is here advanced applies only to a case where water is spilled upon the road in large quantities, such as commonly renders the footing insecure;—but that if the water be only in a small quantity, and not in a degree to endanger the passenger, there is no responsibility.

A person is responsible for any accident occasioned by his throwing water in the highway,

If a person knowingly and wilfully pass over a road in which water has been spilled, as above, and perish in consequence of falling

unless the person who sustained the

damage had  
wilfully pass-  
ed over such  
water.

in it, nothing whatever is incurred by the person who spilt the water, since here the deceased has perished from his own wilfulness or obstinacy. Some, however, remark that this rule obtains only where the water is spilled over a *part* of the road, for in that case a part remains unaffected by it;—whereas, if it extend over the whole road, the passengers have no option; and (as they further observe) the same distinction holds with respect to *timbers*, or other nuisances, set up in the highway.

The person  
who directs  
water to be  
sprinkled in  
the road is  
responsible  
for accidents.

If a shopkeeper desire a person to sprinkle water in the front of his shop, and another person fall there, and die in consequence, the responsibility rests upon him who gave the order, [the shopkeeper,] on a favourable construction;—(and so likewise, if a shopkeeper hire a workman to erect a stall or other edifice in the front of his shop, and after it is finished a person fall over it and die;)—because the order given by the shopkeeper is of a lawful nature, his right to the precincts in front of his shop being superior to that of any other person; and therefore the act of the person whom he directed must be referred to himself.—It is otherwise where a person orders another to throw water, or erect an edifice, in the middle of the highway; for in this case the responsibility rests upon him who obeyed the order, as an order to this effect is unlawful, the man who gave the order possessing no superior right in the highway.

Case of a per-  
son digging a  
well, or lay-  
ing a stone,  
in the high-  
way.

If a person dig a well, or lay a stone, in the middle of the highway, and a man perish in consequence, a fine is due from the *Akilas* of the person who placed such nuisance there. If, on the contrary, an animal were thus to perish, the compensation for the same would be due from the *property* of the person in question; because, as he has been guilty of a transgression, he is therefore responsible for any accidents it may occasion; and as the *Akilas* are not implicated except in offences against the *person*, it follows that, in cases  
of

of *property* merely, the responsibility rests solely upon the offender himself.

THE throwing of dirt or earth in the highway, or the carrying away of earth thence, so as to occasion an hollow, is the same as placing there a stone or log of wood, for the reasons already explained. It is otherwise where a person merely *sweeps* the road; for in this case he is no way liable to responsibility, as his act of sweeping does not occasion any nuisance, but rather the contrary. If, however, this person leave an heap of the sweepings in the road, so as to occasion accidents, he is responsible, since in acting thus he is guilty of a transgression.

The throwing dirt, or digging a hole, in the highway is the same as placing a stone there.

IF a person lay a stone in the highway, and a second person remove the stone to another part of the road, and a man be thereby destroyed, the responsibility rests upon the remover of the stone; because the act of the original depositor is abrogated in its effect, by the place which he had occupied with the stone being cleared, and another place being occupied with it by the act of the remover,—who is therefore responsible for the consequence.

The remover of a nuisance to another spot incurs responsibility for any accident it may afterwards occasion.

IT is related in the *Jama Sagheer*, that if a person construct a common sewer in the public highway, by the order or compulsion of the Sultan, he is not responsible for consequences; because, in constructing the sewer, he has not committed any transgression, for in so doing he acted by order of the Sultan, who possesses a paramount authority with respect to all public rights. It is otherwise where a person does so without such an order; for in that case he is responsible, as having transgressed, in presuming to encroach upon the public rights without a sufficient authority:—besides, acts with respect to the highway are permitted under a condition of safety,—that is, under the condition that they be not injurious. It is to be observed, that

There is no responsibility for accidents occasioned by a sewer constructed in the highway by public authority.

this distinction holds in all cases of acts with respect to the highway, as the same reasoning equally applies to every other instance.

A person digging a well in his own land is not responsible for any death it may occasion.

If a person dig a well in his own land, and another be killed by falling into it, the digger of the well is not responsible, as he has not transgressed; and the same rule also holds where a person digs a well within the precincts of his house, a man being entitled so to do, for the purposes of domestic convenience. Some say that this rule with respect to a well dug in the precincts of a house holds only in cases where the householder has either a property in such precincts, or possesses a right, by immunity, of digging therein;—but that where the precinct is public, or held in partnership, (as in the case of a court or closed lane,) the digger is responsible, since in digging the well under such circumstances he is guilty of a transgression.—This is approved.

A person falling into a well, and there dying of hunger, does not occasion responsibility.

If a person dig a well or pit in the highway, and another happen to fall in, and there perish of hunger, the digger is not responsible, according to *Haneefa*, because the deceased has here died of *hunger*, and not in consequence of the excavation, as his death cannot be attributed to the latter unless he be killed by the fall, which is not the case in this instance.

Workmen employed to dig a well in another's land are not responsible for accidents unless they be aware of the trespass.

If a person hire workmen to dig a well in the precincts of his neighbour's habitation, and they dig it accordingly, and a man be killed by falling into it, the responsibility rests upon the employer, not upon the workmen, provided they dug the well under the idea of the place being within the precincts of their employer; because, as a contract of hire, ignorantly engaged in, is lawful and valid in appearance, their act is therefore referred to the hirer, they themselves having proceeded under a deception:—the case being, in fact, the same as where a person desires another to slay “such a goat,” and he

he does so accordingly, and it afterwards appears that the goat was the property of another,—in which case the compensation is paid by the person who gave the order. It is otherwise where the workmen dig the well, knowing, at the same time, that the place is not within the precincts of their employer; for in this case they are responsible; because the contract is not here valid in appearance, as they have not been deceived.

If a person construct a bridge, or lay a plank, in the highway [over a stream] without authority, and another, wilfully passing over such bridge or plank, fall off and perish, still the person in question is not responsible; because although he be the creator of the cause, and therefore a transgressor, yet as the deceased was a wilful agent \*, and transgressed in his own act †, his destruction is therefore referred to himself; and also, because where the act of one who has an option intervenes, it precludes the reference of the destruction to the first agent; as where (for instance) a person digs a well in the highway, and another gives a man a push, and thereby causes him to fall into the well, so that he dies,—in which case the responsibility rests upon the person who gave the push, since his act, being the act of a wilful agent, precludes a reference of the destruction to the digger of the well.

The builder of a private bridge, &c. is not responsible for any life which may be lost in passing over it.

If a person be carrying a load upon the highway, and the load fall upon any person so as to kill him, or fall in the road so as to cause a person to stumble and thereby occasion his death, the responsibility rests upon the carrier;—whereas, if a person be wearing a cloak upon the highway, and it fall upon any person, or upon the road, so as to occasion death, the carrier of the cloak is not responsible.

A porter is responsible for accidents occasioned by his load.

\* Arab. *Mobàshir*;—literally a perpetrator.

† (Probably) as having passed over the bridge, &c. without leave from the builder of it.

The



The difference between these two cases is, that as the business of the carrier is to take care of his parcel or load, the circumstance of restricting his liberty of carrying it to the condition of safety does not operate as a hardship upon him;—whereas, the business of the wearer is not merely the taking care of his garment, but the *wearing* of it; and therefore, as the restricting his liberty of use to the condition of *safety* would operate as a hardship, his use of it is not restricted to any particular conditions, but is allowed to him generally.

A stranger hanging up a lamp, or strewing gravel, &c. in a mosque, is responsible for any accidents which may arise therefrom;

If a person hang up a lamp, or spread a carpet, or strew gravel in a mosque appropriated to any particular tribe or people, and any person perish in consequence, nothing is incurred, provided the person who hung up the lamp, or so forth, be one of that people;—whereas, if a stranger do any of these acts, he is responsible. In the same manner, if one of the people of a mosque sit in that mosque, and any person perish in consequence, he is not responsible, provided he be, at the time, engaged in prayer: but if he be engaged in reading the KORAN, or teaching, or be waiting for the time of prayer, or sleeping (either during prayer or at any other time,) or conversing, he is responsible. The reason for the law in the former instance is, that as all the regulations of a mosque, such as the appointment of a priest or a supervisor, the opening and shutting of the doors, and so forth, appertain solely to the people to whom the mosque belongs, and not to any others, their acts are therefore of a neutral nature, and are not restricted to the condition of safety; whereas the acts of all others with respect to it are either transgressive, or permitted under the condition of safety; and a pious intention does not prevent responsibility where the person errs in the *manner* of his piety. The reason for the law in the second instance is, that a mosque is constructed particularly for the purpose of prayer, to which reading the KORAN, teaching, or so forth, are only (as it were) appendages; and as it is indispensable that a distinction be made between the original and the branch, or dependant, the act of prayer (which is the original) is therefore permitted generally,

generally, without any restriction to the condition of safety, whereas all other acts or employments are so restricted.

If a stranger to the people of the mosque be at prayers in it, and a person fall over him, and die in consequence, the stranger is no way responsible; because (as has been already observed) a mosque is constructed for the purpose of prayer; and although the right of public prayer appertain solely to the people of that mosque, yet any person is entitled to pray there alone.

but he is not responsible for accidents occasioned by his own person.

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## SECTION.

### *Of Buildings which are in danger of falling.*

If a wall belonging to any person lean towards the public highway, and a person require the owner to pull it down, and call people to witness his requisition, and the owner neglect taking it down, until at length it fall and destroy either man or property, the owner is responsible for the damage so occasioned, on a favourable construction. Analogy would suggest that he is not responsible; (and such is the doctrine of *Shaf'ei*;) for he has neither perpetrated the destruction himself, nor done any thing transgressively to occasion it, as he built the wall in his own right, and its tottering, or the wind shaking it, were not his acts, whence the case is the same in effect as if the wall had fallen previous to the requisition, and calling of witnesses, as aforesaid. The reasons, however, for a more favourable construction of the LAW in this particular are twofold.—FIRST, upon a wall leaning over

The owner of a ruinous wall is responsible for any accident occasioned by it after having received due warning, and requisition to pull it down.

over towards the highway, the public communication becomes interrupted, and the way \* occupied by the property of the owner of that wall. When, therefore, any person makes application to him, and requires him to clear the way, it is incumbent on him so to do; and he is consequently guilty of a transgression in neglecting it, and therefore remains responsible for any damage it may occasion;—in the same manner as where a man finds his garment upon another, and demands it of him; in which case, if that other refuse to deliver it, he is guilty of a transgression, and is consequently responsible for the garment if it should be lost whilst in his possession.—SECONDLY, if the owner of the wall were not made responsible for any damage its falling might occasion, he would neglect to remove the nuisance, and consequently passengers would sustain an injury, as they would be deterred from going by the place, for fear of the wall falling on them. The removal, moreover, of any thing injurious to the community is a duty incumbent upon the person to whom it belongs; and as the owner of the wall is the person immediately concerned in the present instance, it is therefore incumbent on him to take it down, notwithstanding his so doing may be prejudicial to himself, since private interest must yield to public benefit. It is requisite, however, that such a time be allowed as may admit of the owner taking down his wall, this being indispensable to the establishment of offence from neglect or delay. If (after the requisition for pulling it down) any person be destroyed by the wall falling, a fine is due from the *Akilas* of the owner, not from the owner himself; for as the offence, in this instance, is still short of *homicide by misadventure*, an alleviation is admitted *a fortiori*, lest the owner should suffer too severely:—but if, on the contrary, *property* (such as an animal, or household goods) be destroyed, the compensation for it must be paid by the owner of the wall, as the *Akilas* are not implicated in the responsibility for property. It is to

\* Arab. *Hawá*; literally, the *air*, or *atmosphere*; a phrase generally used where the nuisance or obstruction is not immediately upon the ground.

be observed that the *application* [that is, the requisition for pulling down the wall] is a condition of responsibility, but not the *taking to witness*; for the latter is called in aid merely with a view to establish the former, in case of the owner of the wall denying it, and is therefore used only out of caution. The *application* is made by the claimant saying to the owner of the wall, "Your wall has become dangerous;—you must therefore take it down, lest it prove destructive;" and the *taking to witness* is effected by his saying to the bystanders, "be ye witnesses that I have required this person to take down his wall."—It is proper, however, to remark that the taking to witness before a wall has become ruinous or crooked is not valid, as transgression cannot be established previous thereto.

If a person build a wall in the highway, leaning over from the first, lawyers remark that he is responsible for any thing which may be destroyed by its falling, independent of the requisition before mentioned, as having been guilty of a transgression in the building of it, in the same manner as a person who constructs a balcony or gallery projecting over the highway.

A person building a crooked wall is responsible for the damage occasioned by its falling.

THE evidence of one man and two women suffices to establish the application above described; for it is not here requisite, as in cases of murder, that both the witnesses be males, the death occasioned by the falling of a wall not amounting to murder.

The requisition is established upon the evidence of one man and two women.

A MUSSULMAN and a *Zimnee* are upon an equal footing with respect to the requisition for pulling down the wall, as all mankind are partners in the right of passing along. The application is therefore valid, by whomsoever it be made,—whether a man, a woman, a free-man, a *Mokâtib*, a slave, (provided his master give him permission to litigate the point,) or an infant, (with permission to litigate from his guardian.)—It is also valid whether made by the Sultan or any other;

A *Zimnee* may make it, as well as a *Mussulman*;

for as the application affects a matter of right in which all are equally concerned, all are therefore equally entitled to make it.

or the inhabitants of a neighbouring house;

If a wall lean over towards a neighbouring house, the owner of the house is entitled to require it to be pulled down,—or the tenants, whether they be hirers or borrowers,—for to such persons in particular the right appertains in this instance.

and if those last grant a term of delay, it is valid.

If the owner or tenants of the house grant the owner of the wall a term of delay, or exempt him from responsibility for any damage which may be occasioned by it, it is lawful, and the owner of the wall is not responsible in case of any thing being destroyed by its fall, because the right of the owner or tenant alone is concerned. It is otherwise where a wall leans over a road, and the magistrate, or the person who made the requisition for pulling it down, grants a term of delay, or an exemption; for this is not valid; and the owner of the wall consequently still remains responsible in case of its falling and destroying any thing; because here the right of every one is concerned; and the magistrate, or the person who made the requisition, is not at liberty to annul a right of the public.

A person selling a ruinous house, after requisition, is not responsible for any accidents it may occasion.

If, after application, a person sell a house, the wall of which leans over, and the purchaser take possession of it, and any thing be then destroyed by its falling, there is no responsibility whatever upon either party.—The *seller* is not responsible, as offence cannot be established in him unless it appeared that he neglected to take down the wall, having at the same time ability so to do; and here his ability has terminated with the sale:—neither is the *purchaser* responsible, because no application has been made to him. But if application be made to the purchaser after the sale, he then becomes responsible, as in that case he possesses the ability of complying with the requisition.

THE

THE application and requisition for pulling down a ruinous wall are valid when made to any one who possesses the power of pulling it down;—but not when made to one who is not possessed of this power, such as a pawnee, a trustee, a borrower, or a renter. The application and requisition in question are therefore valid when made to the pawner of a house, as he has it in his power to pull down the wall by redeeming his house. They are also valid with respect to a wall belonging to an infant when made to the infant's parents or guardians; and if, after the requisition, they neglect to pull down the wall, and any thing be destroyed by the fall of it, the compensation falls upon the infant's property, because their act is, in effect, the act of the infant. They are likewise valid with respect to a *Mokâtib*, as he may be authorized to pull down a wall; and also, with respect to a trading slave, whether indebted or otherwise, for the same reason;—and if, in this last instance, the slave neglect to pull down the wall, and any property be destroyed by the wall falling, the compensation for it rests upon the slave's person\*;—or, if a *man* be destroyed, the fine is due from the master's *Akîlas*.

The requisition (to be *valid*) must be made to a person capable of complying with it.

IF a ruinous wall be held in coparcenary by several heirs, and a person apply to one of the heirs, requiring him to pull down the wall, the application affects that heir in particular; and accordingly, if any thing be afterwards destroyed by the falling of the wall, the heir who was applied to is responsible in proportion to his share of inheritance; for it was in his power to have remedied the nuisance by referring the matter to the *Kázee*, and representing the circumstance to him, requiring his order to his coparceners (if present) to pull down the wall,—or (if absent) his authority to do so himself.

The requisition, made to one of several coparceners, affects that coparcener in particular.

IF a ruinous wall fall upon a man, after application, and destroy

After a wall falls, it is the

\* That is, he must either be made over or redeemed, as in other cases of offence.

duty of the owner to remove the ruins; and failing of this, he is responsible for subsequent accidents.

him, and another person fall over the corpse, and so perish, the proprietor of the wall incurs nothing for this second person, because the removal of the corpse was incumbent upon the *heirs*, not upon *him*. If, on the contrary, another person, after the wall falling, be destroyed by stumbling over a fragment of the ruins, the owner of the wall is responsible, as it is his business to clear the road of all such fragments, since those are his property, and an application with respect to the wall itself is (as it were) an application with respect to the fragments, the intention of it being *to clear the highway*.

The owner of a ruinous wall is not responsible for accidents occasioned by the fall of any article from it, unless such article belong to him.

If a person make application concerning a wall which leans over towards the highway, and it afterwards fall, throwing down a vase, or urn, which had stood upon it, and a man be thereby destroyed, the owner of the wall is responsible, provided the vase or urn was his property, as the freeing the road from it rested upon him. If, on the contrary, the vase or urn be the property of some other, the owner of the wall is not responsible, since the freeing the road from the vase or urn rests upon him to whom it belongs.

## C H A P. III.

Of Offences committed *by* or *upon* Animals.

THE rider of an animal is answerable for any thing which the animal may destroy by treading it down, or by striking it with his head, his forefeet, or his body: but he is not responsible for any thing which the animal may destroy by striking it with his hind-feet or his tail.— In short, it is a rule that the right of passing on the highway is allowed to the whole community, under the condition only of *safety*; for it is the exercise of a privilege in the passenger, with respect to *himself* in one shape, and with respect to *others* in another shape, the right of passage being participated among the whole community,— whence it is adjudged to all, under the condition of safety, with a view to the interest of both parties.—It is moreover to be observed, that a restriction to the condition of safety can obtain only in matters where an attention to safety is practicable; for if it were imposed where such attention is impracticable, the exertion of the privilege [of travelling on animals] would be altogether precluded. Now it is possible for a man to guard against the animal he rides treading men or property under foot, and such like, since a person who rides is under no necessity of treading down every thing that lies in his way: but he cannot guard against the animal striking things with his hind-feet or tail, since an animal unavoidably uses these parts, in travelling, without any immediate controul from its rider. Accordingly, he is restricted to the condition of safety in the former instance, but not in the latter. If, however, he stop the animal in the highway, he is responsible for any destruction which may be occasioned by a kick of its

The rider of an animal is responsible for any damage occasioned by it, which it was in his power to prevent;

and if he stop the animal in the road, he



is responsible  
for all acci-  
dents.

its hind-feet, or a stroke of its tail, since it is possible for him to avoid stopping, although it be not in his power to guard the animal from kicking; or so forth; and therefore, as he transgresses in so stopping; he is responsible for any damage which may ensue in consequence.

He is also re-  
sponsible for  
any injury  
sustained  
from a *large*  
stone, thrown  
up by the ani-  
mal's hoof:

If an animal's hoof strike upon and throw up gravel or small stones, and a person's eye be put out, or his clothes damaged thereby, the rider is not responsible; whereas, if the animal so throw up a *large* stone, he is responsible. The reason of this is that in the former case it was impossible to guard against the accident, since an animal cannot move without being liable to it; whereas, in the second instance, it is possible to guard against the accident, since animals may easily be so guided as to avoid large stones. It is to be observed that, in all these cases, a second rider (that is, one who rides behind the first) is in the same predicament as the first, with respect to responsibility.

but not for  
any accident  
occasioned by  
its dung or  
urine,

unless he had  
stopped it on  
the road un-  
necessarily  
whilst dis-  
charging  
those.

If an animal, whilst travelling, discharge its dung or urine on the highway, and any person perish in consequence, the rider is not responsible, since it was impossible to guard against this; and the same rule also holds where the animal stands still whilst discharging its dung or urine, or when the rider stops it for this purpose, since there are several animals which cannot perform these whilst in motion. If, however, the rider have stopped the animal for any other purpose, and it discharge its dung or urine, and any person perish in consequence, he [the rider] is responsible, as in so doing he was guilty of a transgression, since he stopped the animal without any absolute necessity, knowing, at the same time, that this must be injurious to the passengers.

THE

THE driver of an animal is responsible for any damage the animal may occasion with either its fore or hind-feet, whereas the *leader* of an animal is responsible for the damage occasioned by its *fore-feet* only, not by its *hind-feet*. The compiler of the *Hedaya* remarks that this is what is said by *Kadooree* in his compendium;—and several of our modern doctors coincide in the same opinion; because, as a person who drives an animal before him has a view of his hind-feet, it is therefore in his power to avoid accidents from them; whereas, a person who leads an animal after him, not seeing or having any command over its hind-feet, cannot possibly guard against such accidents. Most of our modern doctors, however, are of opinion that as the driver of an animal has no more command over its hind-feet than a person who leads it, he therefore is not responsible, any more than the other, for the damage which may be occasioned by them;—and this is approved.

Responsibility attaching to the driver or leader of an animal.

It is written in the *Jama Sagheer*, that the *driver* or *leader* of an animal is responsible in all the instances in which responsibility lies against the rider; for as they (as well as one who rides) occasion the damage by taking the animal to the place where it is committed, their so doing is therefore restricted to the condition of safety, as far as may be practicable, in the same manner as holds with respect to the rider.

THE rider of an animal is required to perform expiation only where he has happened to *tread down* a person,—not in any other instance;—but no expiatory act whatever is required from the *leader* or *driver* of an animal. The reason of this is that, in the case of *treading down* a person, the rider is, in effect, the perpetrator of the homicide, as it is by *his* weight that the person is destroyed,—the weight of the animal being merely a dependant upon the weight of its rider, since to him the *motion* of it must be referred, it being the *instrument* of such motion.

Expiation is required from the rider of an animal,—not from the leader or driver.

motion. It is otherwise with the *leader* or *driver* of an animal; for those are only the producers of the intermediate cause, and not the actual perpetrators of the homicide, as their acts did not immediately affect the subject; (and the same reasoning holds with respect to the act of the rider in all cases except that of *treading down*;)—and expiation is enjoined, in cases of homicide, only where the offender is the *actual perpetrator* of the homicide, not where it is effected by an *intermediate cause*. In the same manner, the rider of an animal is excluded from his succession to the deceased by bequest or inheritance, in a case of *treading down*, but not the *leader* or *driver*, exclusion from bequest or inheritance being restricted to the *actual perpetrator*.

If there be a rider, as well as a leader or driver, responsibility attaches to the former, not to the latter.

If one man ride upon an animal whilst another drives or leads it along, and it tread down a man, some say that no part of the responsibility falls upon the driver or leader; because the rider (as has been already explained) is accounted the *actual perpetrator* of the homicide, and the driver or leader the producer of the intermediate cause; and the accident must be referred to the actual perpetrator, rather than to the producer of the cause.—This is approved,

Case of two riders driving against and killing each other.

If two men be riding on two different animals, and rush with violence against each other, so that they both die, the fine for each is due from the *Akilas* of the other. *Shaf'ei* and *Ziffer* maintain that in this case the *Akilas* of each party owe an *half* fine only, on account of the other\*, each having died as much in consequence of *his own* act as of that of the *other*, whence one half of the homicide, on each part, is of no account.—The argument of our doctors is, that the death of each party must be referred solely to the act of the other, and not in any degree to *his own* act, for *his* act (namely, passing along

\* The fines here (as in all other cases) go to the heirs of each party respectively.

the highway) is purely of a neutral nature, and an act of such a nature does not admit of the death being referred to it so as to occasion responsibility. It may indeed be objected, that upon this ground the whole of the blood is of no account, and of course that nothing whatever is due from the *Akilas* on either side;—for as the act of both (namely, passing along the highway) is of a neutral nature, it cannot be made the occasion of responsibility. In reply, however, to this it is to be observed, that although the act of each party, respectively, be of a neutral nature, still it is restricted to the condition of safety; and a neutral act, restricted to the condition of safety, notwithstanding that it be not an occasion of responsibility with respect to the party *himself*, is nevertheless so with respect to the *other* party. It is to be observed, however, that a complete fine for each rider is due only where they have happened to rush against each other (as above) by *misadventure*; for where they have done so *wilfully*, an *half* fine only is due on account of each. All that is here advanced proceeds on the supposition of the parties being *freemen*; for if they be both *slaves*, the blood of each is of no account\*:—it is not of any account in a case of *misadventure*; because the offence of a slave affects only his own person, in this way; that his master makes his person over to the avenger of offence, or pays him an atonement in lieu thereof; but in the present instance the persons of both slaves are destroyed, in such a manner that the masters have no concern with it; nor have they left any thing in lieu thereof; and hence the blood of each must needs be of no account:—and so likewise in a *wilful* case; because each of them has perished at the time of his offence, without leaving any thing in lieu of his person, and in such a manner that the masters have no concern in it,—whence the blood of each must needs be of no account in this instance also. If one of the parties be a slave, and the other a free-

\* Literally, “—*goes for nothing*.”—The translator adopts the phrase here used in preference, as being somewhat more elegant, and expressing the sense of the author with equal correctness.

man; then, in a case of misadventure, the freeman's *Akilas* are responsible for the value of the slave, which must be paid to the freeman's heirs; whose right is extinguished with respect to any thing beyond such value;—(as if, for instance, the value of the slave were one thousand *dirms*; in which case the freeman's heirs would be entitled to take, from his *Akilas*, one thousand *dirms*, the remaining nine thousand of the freeman's fine being remitted;—) because, in conformity with the tenets of *Haneefa* and *Mohammed*, the value of the slave is due from the freeman's *Akilas*, as the compensation for his [the slave's] person, for which the *Akilas* are responsible;—and of this the freeman's heirs are entitled to possess themselves, because it is (in effect) an *equivalent* for the slave;—but their right to any thing beyond the value of the slave drops, as the slave has left nothing behind him to answer such excess. If, on the contrary, the parties, being a slave and a freeman, rush against each other *wilfully*, the freeman's *Akilas* are accountable only for *half* the value of the slave, (a *wilful* case only inducing *half* of the responsibility,) which must be paid to the freeman's heirs; for as, in this instance, a moiety of the fine for the freeman was due from the slave, and he left nothing except the half of his value, (as above,) they are therefore entitled to possess themselves of the same, and the remainder of the half fine, beyond half the value of the slave, is remitted.

The driver of an animal is responsible for any accident occasioned by its saddle, &c. falling off.

If a person be driving an animal along, and the animal's saddle or load, or any thing else which may be upon it, fall off, and kill a man, the driver is responsible, as having been guilty of a transgression, in neglecting to secure the load, or so forth, properly upon the animal, for if it had been sufficiently secured, it could not have fallen off.

Responsibility in the case of a string of camels.

THE person who leads a string of camels is responsible for any thing which they may tread down. If, therefore, the camels tread down a *man*, the fine for him is due from the leader's *Akilas*, or, if they

they tread down *property*; he is to make compensation for the same; because it was his business to look to the camels, in the same manner as a driver; and as, where he neglects so to do, he is guilty of a transgression, and transgression occasions responsibility, he is responsible accordingly: — but the responsibility for the *person* rests with his *Akilas*, and that for the *property* with himself, as has been already explained. If there be a *driver* to the string, as well as a *leader*, the responsibility rests equally with both; because, as the leader of one camel is the leader of the whole, so the driver of one is the driver of the whole, the halter of each being fastened to the one immediately before him. This rule, however, obtains only where the driver is at the end of the whole string; for if he be in the middle, and there lay hold of the halter of one of the camels, he alone is responsible with respect to such damage as may be occasioned by the camels which come after him; because the leader at the head of the whole cannot be said to lead those; on account of the string being thus interrupted; or that both are equally responsible for any damage occasioned by the camels before him, since he drives those at the same time that he leads the others.

If a person fasten a camel to a string of camels, with the leader's knowledge, and the camel so fastened tread down a man, the fine for him is due from the leader's *Akilas*, because it was in his power to have looked after and watched his camels, so as to prevent an additional one being joined to the string; and in neglecting so to do he was guilty of a transgression; which occasions responsibility. Now the homicide, in this instance, is *homicide by an intermediate cause*; and the fine for it therefore falls upon the *Akilas*, in the same manner as in a case of homicide by misadventure. But the leader's *Akilas* are entitled afterwards to reimburse themselves by taking the amount of the fine from the *Akilas* of the person who fastened the additional camel to the string; because it was by his act that they became subjected to the payment of it; and the only reason why the responsibility

did not fall upon them at the first is, that the act of fastening the additional camel was a sort of creation of a cause, whereas the leading of the string is, in the eye of the law, equivalent to the actual commission of the homicide, the destruction having been occasioned by the leading of the string, not by fastening the additional camel;—and as the actual perpetration of the homicide is a thing of a more forcible nature than the mere creation of the *cause* of it, the responsibility consequently first falls upon the *Akilas* of the leader. Lawyers remark that what is here advanced (of the leader's *Akilas* having recourse to the *Akilas* of the fastener) applies only to a case where the additional camel was fastened to the string at a time when it was moving forwards; for as, in this case, the fastener does, as it were, *direct* his camel to be led, he therefore impliedly assumes the responsibility for such damage as it may occasion:—but where the additional camel was fastened to the string at a time when it stood still, and the leader afterwards leads it on, and a man is trodden down by this additional camel, the responsibility rests with the leader's *Akilas*, who are not entitled, in this case, to reimburse themselves from the *Akilas* of the fastener, because here the leader appears to have led on the camel of another without that other's concurrence, as he has not signified his consent either *expressly* or by *implication*.

A person is responsible for the damage occasioned by hunting his dog at any thing;

If a person let slip \* his dog, and *drive* him, (that is, *run after* him,) and the dog, without stopping, destroy any thing, the responsibility for it rests with the person who let him slip, the act of the dog being attributed to him because of his *driving* him;—whereas, if a person cast off his hawk, and drive her, (as above,) and she, without stopping, destroy any thing, the person who cast her off is not responsible.—(The reason of this distinction between a dog and a hawk is, that a quadruped is capable of being *set on* or *driven*, whereas a bird

\* Literally, *give head to*. (See *Hunting*, p. 171.)

is not so,—whence a regard is paid to the driving of the *one*, but not of the *other*.)—If, on the contrary, a person let slip his dog *without* driving him, (that is, without running after him,) and he destroy any thing without stopping, the person who let him slip is not responsible; because, as the dog, in this instance, acts from his own option, his act cannot be attributed to the person who let him slip.—It is related as an opinion of *Abou Yoozaf* that, in all those cases, the person who cast off the hawk or let slip the dog is to be held responsible, out of a regard to the preservation of property. *Mohammed* also observes, in the *Mabsoot*, that where a person lets slip or casts off any animal upon the highway, and the animal, without stopping, kills a man, the responsibility for the same rests upon the person who cast it off, or let it slip, whether he have *driven* it, or otherwise, the motion of the animal being referred to the person who let him slip, so long as it continues to move on in a straight line:—but that, upon the animal turning off to the right or left, the effect of letting it slip terminates,—in other words, the person is no longer responsible in case of any damage;—and the same rule also holds where the animal stops, and then moves on of itself; for if, afterwards, any thing be destroyed, there is no responsibility.

but not unless  
he *drive* or  
*encourage* the  
dog;

If a person let slip his dog at game, and the dog destroy any thing else, without stopping, yet the person who let him slip is not responsible, provided he did not *drive* (that is, *run after*) him; for as hunting is a thing unlimitedly lawful, and is not restricted to the condition of safety, (it not being an exertion which can affect any other than the hunter himself,) transgression (which is the occasion of responsibility) cannot be established in this instance. If, on the contrary, a person let slip his dog on the highway, and the dog destroy any thing without stopping, compensation must be made by the person who let him slip; because, although the occupancy of the highway be a matter of a neutral nature, still it is restricted to the condition of safety, as being an exertion affecting the community; and the

nor where he  
has let him  
slip at game..



letting slip the dog, being an endangering of the safety of the highway, is therefore a transgression, and consequently induces responsibility.

A man, casting off his animal on the highway, is responsible for any depredations it may commit.

If a person cast off or set loose an animal on the highway, and the animal move straight on, and then, turning to the right or left, tread down corn, or so forth, the person who cast it loose is responsible; but not if there be more roads than one. If, on the contrary, an animal break loose, and then, moving on of its own accord, kill a man, or tread down property, either by night or day, the owner is not responsible; because the prophet has so ordained; and also, because the act of the animal cannot, in this case, be attributed to the owner, since he neither cast it off nor drove it.

For the eye of a goat an adequate compensation is due; and for the eye of a labouring animal a fourth of the value.

If a person put out one of the eyes of a goat, he must compensate [not for any determinate part of the whole value, but merely] for the defect thereby occasioned; because, as the only use of a goat is its milk, or its flesh, not its labour, nothing more can be required than merely the diminution occasioned in its value. For the eye, on the contrary, of an ox, a camel, a dromedary, an ass, or a horse, of whatever description, a compensation must be made of one fourth of the value; because the prophet has said, "*For the eye of every animal except a goat ye must pay a fourth of the value of the animal*,"—and also because, as the work of the animal cannot be performed but by means of *four* eyes, (two of the animal, and two of his driver,) the animal may therefore be said to have *four* eyes,—whence a fourth of his value is due for the loss of one eye.

Cases of damage occasioned by an animal, having a rider on its back,

If a person be riding upon his beast on the highway, and another person strike or goad the beast, without the consent of the rider, so as to cause it to kill a man by kicking, or treading him down, or running over him, the responsibility rests upon the person who so struck or goaded it, not upon the rider; because the former was the

instigator

instigator of the animal's act, which must therefore be referred to him; and also, because this person is the producer of the *cause* of the accident, (for an animal naturally kicks upon being struck or goaded,) and, as such, is guilty of a transgression, having goaded the beast without the rider's consent; and as the *rider* has not in any respect transgressed, he [the goader] is therefore solely responsible.—(If, however, the rider, at the time of the other person striking or goading the beast, had stopped it in the highway, the responsibility rests upon him and the goader in equal shares, as in this case he also has transgressed, in having stopped the animal upon the road.)—If, on the contrary, the beast strike out at the person who goaded or struck him, as above, and he die of the kick, his blood is of no account, as he may be said to have slain himself. If, on the other hand, the beast throw his rider, and kill him, the fine for him is due from the *Akilas* of the goader or striker, he having transgressed in producing the cause of the accident.

If a person be riding or stopping upon his beast on his own land, and another goad or strike the beast without the rider's consent, and the beast fly out and tread down a man, the responsibility rests upon the person who so goaded or struck it, and not upon the rider, for the reasons before explained.—If, on the other hand, a person be riding upon his beast on the highway, or stopping upon it on his own land, and another goad or strike it by his desire, and it fly out and tread down a man, neither the rider nor the other are in any degree responsible:—the *latter* is not so; because his act of striking or goading the animal is in such a case tantamount to that of the rider himself;—nor is the *former* [the rider] so, as he has here authorized an act to which he is perfectly competent, the *goad*ing of an animal being equivalent to *driving* it. But if the rider be *moving along the road* upon his beast, and another then strike or goad it by his desire, and it tread down a man, both parties are responsible in an equal degree, provided the man

man was trodden down without the beast making any stop, because, in this case, its motion is referred to both alike\*.

or being led  
in hand.

If a man be leading an animal, and another strike it, and it break away from the leader, and commit any damage without stopping, the person who struck it is responsible; (and so likewise where the animal was *driven* by any person, instead of being *led*;) because, as the breaking away of the animal was owing to the act of the striker, any accident that may ensue is referred to him.

A person  
wantonly  
striking an  
animal, so as  
to occasion  
mischief, is  
responsible;

If the striker, in the examples here recited, be a slave, he is not responsible in his person for any damage which may ensue;—or, if he be an *infant*, the responsibility (for *property* destroyed, or for any personal injury short of a *Mawziha* wound) lies against his *master*, because slaves and infants are liable to be prosecuted for their acts. So that

and so like-  
wise, a person  
who sets any  
thing in the  
highway,  
which renders  
the animal  
mischievous.

If a beast be struck by any thing which a person may have set in the highway, and fly out, and kill a man, the responsibility rests with the person who placed the thing there; for as he transgressed in so doing, the striking is therefore referred to him, the cause being in effect the same as if he had himself struck the animal.

\* A frivolous discussion, on this point, of considerable length is omitted by the translator.

CHAP.

## CHAP. IV.

Of Offences committed *by* or *upon* Slaves.

UPON a slave committing any offence by *misadventure*, his master must be required either to make him over to the avenger of the offence, or to pay a redemption\* for him. This is according to our doctors. *Shaf'ei* maintains that the slave's offence attaches solely to his person; whence he must be sold in order to make satisfaction for it, unless his master agree to pay the *fine* thereby incurred. One result of this difference of opinion is that, according to our doctors, if the master, being aware of the offence, emancipate the slave, he is immediately supposed to prefer the mode of paying a redemptionary atonement, as above; for as he had two modes of conduct in his choice, and thus incapacitates himself from adopting one of them, the other consequently remains binding;—whereas, according to *Shaf'ei*, the offence, after such manumission, is to be accounted for by the *slave*, not by the *emancipator*; because it was to have been accounted for by means of his person; and as the master, in emancipating him, parted (as it were) with his person, the matter of course rests with the slave. (It is to be observed that, concerning this case, a difference of opinion obtains among the companions; the opinion of *Ibn Abbas* coinciding with the tenets of our doctors, and that of *Omar* with the tenets of *Shaf'ei*.)—*Shaf'ei*, in support of his opinion, argues

A slave committing an offence by misadventure must be made over to the avenger, or redeemed;

\* Arab. *Fiddeyá*.—The redemption, or redemptionary atonement, in this instance, must not be confounded with the ransom in a contract of *Kitābat*, *Fiddeyá* being defined “a redemption for what is otherwise forfeited.”

that, in the laws concerning offences, the original principle is that the responsibility rests upon the offender himself; but that the *Akilas* are to bear their part. Now a slave has no *Akilas*, for (according to *Shafai*) a man's *kindred* are his *Akilas*; but between the slave and his master no relationship whatever subsists;—and such being the case, the responsibility for an offence by misadventure rests upon the slave's person in the manner of a debt; and he will accordingly be sold for an offence against the *person* in the same manner as for an offence committed upon *property*.—Our doctors, on the other hand, argue that the original principle, in the case of offences by misadventure against the person, is that the responsibility must not rest entirely upon the offender, lest it should prove ruinous to him, (because he is in this instance excusable, as he did not *design* to offend,) but that his *Akilas* must bear their part of it; and the master of the slave is his *Akila*; because the ground of the relation of *Akila* is *support* and *assistance*, and a master stands as the *supporter* and *assistant* of his slave. The responsibility, therefore, for an offence by misadventure, committed by a slave, rests upon his *Akila*, namely, his master:—but not for an offence committed upon property, the *Akilas* not bearing any part of the responsibility for offences of that description.

OBJECTION.—If the master be the *Akila*, it would follow that no option should be allowed to him between putting away the slave and paying the redemptionary atonement for him;—in the same manner as holds with respect to all other *Akilas*.

REPLY.—An option has been ordained, in this instance, as an alleviation to the master, lest the matter might prove essentially injurious to him. This alleviation, in fact, is requisite in both instances; the only difference being that, in the case of other *Akilas*, it is effected by dividing the responsibility among the whole;—whereas, in the present instance, it is effected by giving the master an option of making over the slave, or paying the redemption; for he is only *one*, and the option is a kind of alleviation to him. The making over the slave is indeed what is originally required, (according to the *Rawāyet Saheeb*;) but

but the master is thus at liberty to redeem his slave by paying the redemptionary atonement;—whence it is that he stands acquitted of all claim, and that nothing whatever is required of him, in case of the slave dying before he has made his option, as above; because the slave was the subject due, which here no longer remains. It is otherwise in the case of an offender dying who is a *freeman*; for in this instance the fine is still due from his *Akilas*, as the discharge of the thing incurred [the fine] is in no respect connected with the *person* of the freeman, the subject, in this instance, not being such as to constitute a means of payment.

UPON the master of an offending slave making him over to the avengers of the offence, they become proprietors of the slave.—If, on the other hand, he prefer paying the redemption, the *fine* of the offence is therein included. Whether, moreover, he chuse to make over the slave, or to redeem him, the same becomes binding upon him on the instant;—the making over of the slave is so, because a delay in the case of an article existent and present on the spot can answer no end, delay being ordained by the LAW for the purpose of preparation, which is not required in the case of a thing already prepared;—and the payment of the ransom is likewise so, because it is a substitute for the slave, and is therefore subject to the same rule with the slave himself. Whether, also, he chuse to make over the slave, or to redeem him, the avengers of the offence are not at liberty to refuse either of these;—not the *first*, because it is their right; and therefore, upon the slave being relinquished to them, their power of claim ceases;—nor the *second*, because they are only entitled to a consideration for the offence, which being paid, the slave remains with his master.

and which-  
ever of these  
may be pre-  
ferred by the  
master, (who  
must make  
his option  
without de-  
lay,) the same  
is binding  
upon him.

If the slave happen to die before the master has made his option; as above, the right of the avenger of offence is annulled, as the subject with which his right was connected no longer remains. If, on

The right of  
the avenger  
is annulled by  
the slave dy-  
ing before the

master has  
declared his  
option.

the contrary, he die after the master had adopted the option of redeeming him, he [the master] is not acquitted by that circumstance, but it is still incumbent on him to pay the redemptionary atonement, because, upon his chusing to pay that in preference, the right of the avenger of offence is transferred from the person of the slave to his [the master's] person.

A second offence by the same slave, is subject to the same rules.

If a master pay a redemption for his offending slave, and the slave afterwards commit another offence, the second offence is subject to the same rules with the first; because, upon being cleared from his first offence, he stands in the same predicament as if he never had offended before.

A slave committing two different offences is made over, in adequate proportions, to the avengers.

If a slave commit two offences, the master must be desired to make him over to the two avengers of offence, in order that they may share him between them according to their respective claims from offence; because the attachment of the *first* offence to his person does not prevent the *second* offence from so attaching; for as the master's right in the slave did not prevent it in the *first* instance, that of the first avenger cannot prevent it in the *second*, *a fortiori*; (and the same rule also obtains where a slave commits *more* than two offences.)—If, therefore, a slave kill one man, and put out the eye of another, he is made over between the heir of the person slain, and the person deprived of the eye, in three portions, the fine for an eye being one half of the fine for the person. The same rule also obtains with respect to wounds;—that is, if a slave wound several persons, he is made over, and divided among them, according to the injury each may have sustained.

A slave committing a variety of offences, the master may satisfy the

WHERE a slave commits a number of different offences, the master is at liberty to satisfy some of the plaintiffs by paying a redemptionary atonement, and others by making over a proportionable part of the slave; for the rights of all are different, because of the difference in the

the grounds of them, namely, the *offences*, that committed upon each in particular being distinct and separate from those committed upon all the others;—whence it is lawful for the master to adopt a mode of settlement with one different from what he pursues with respect to another. It is otherwise where a slave kills one person, having two heirs;—for in this case it is not lawful for the master to pay a redemption to the one heir, and make over a proportionable part of the slave to the other, as the rights of both are one and the same in this instance, the offence being *one*;—whence it is not lawful to make a distinction in the atonements for the one offence, by giving a redemption to the one, and making over a part of the slave to the other.

several plain-  
tiffs in vari-  
ous ways.

If a master emancipate his slave who has committed an offence, of which he [the master] is at that time ignorant, he is responsible for whichever is the smallest of the two, the value of the slave, or the fine for the offence. If, on the contrary, he emancipate him, *knowing* the offence, he is responsible for the complete fine, to what ever amount. The reason of this is that, in the former instance, the master, in emancipating the slave, opposes the right of the avenger of offence, (namely, the making over of the slave to him,) as the subject to be made over no longer remains; and is therefore responsible: but he is so only for the least sum, between the value of the slave and the fine; because, being ignorant of the offence at the time of emancipation, he cannot be accounted to act under an option, of making over the slave, or paying the ransom for him, since he could not possibly make an option unless he were aware of the offence. In the *latter* instance, on the contrary, he is accounted to have adopted the option of paying the redemption; because the manumission of the slave prevents the making of him over; and upon his proceeding to emancipate him, at the same time that he is aware of his offence, it becomes evident that he has adopted the payment of a redemptory atonement. What is observed with respect to these two instances applies equally to the cases of a master *selling* his offending slave, or giving

A master ig-  
norantly A  
emancipat-  
ing his of-  
fending slave  
is responsible  
to the avenger  
for the least  
sum, be-  
tween the fine  
and the value;  
but if he  
emancipate  
him, *knowing*  
of the of-  
fence, he is  
accounted to  
have adopted  
the mode of  
redemption,  
and is accord-  
ingly respon-  
sible for the  
complete  
fine;



giving him away, or making him a *Mokabbir*, or (if a female) an *Am-Walid*,—all these acts being preventive of making the slave over, as they annul the master's right of property. It is otherwise, indeed, in a case of acknowledgment;—(that is, where the master in whose hands the offending slave is acknowledges [declares] him to be the slave of another;)—for the acknowledgment does not invalidate the right of the avenger of the offence, since in such case the person in whose favour it is made will be required to make over the slave. This is according to the *Mabsoot*.—(*Koorakbee* maintains that acknowledgment is connected with sale; because the offending slave is the property of the acknowledger in appearance, and the person in whose favour it is made is entitled to him solely in virtue thereof, in the same manner as, if the master were to declare his having sold the slave to this person.)—It is proper, also, to remark, that as the opinion delivered in the *Mabsoot* upon this subject is mentioned without any restriction, the rule comprehends all offences whatever, whether affecting life, or otherwise; because *fine* is equally incurred in all instances. It is also to be observed, that what has been said of *sale* (as being similar to *emancipation*, in the case in question) applies equally to sale under a condition of option on the part of the feller; as the feller's right of property is extinguished by this, as well as by an *unconditional* sale. It is otherwise where an option is reserved to the feller, or where he merely exposes the slave to sale; for in neither of these cases is his right of property extinguished.

and so, likewise, if he make delivery of him under an invalid sale, or constitute him a *Mokattib*,

If a master sell his slave, being an offender, by an invalid sale, he is not accounted to have adopted the mode of redemption until such time as he deliver the slave to the purchaser; for, in a case of invalid sale, the feller's right of property is not extinguished until the article sold be actually delivered over to the purchaser. It is otherwise where a master constitutes his offending slave a *Mokattib*, by an invalid contract; (as where, for instance, a *Mussulman* master does so, in consideration of *wine* or *pork*;)—because, in such case, the master is accounted

counted to have adopted the mode of redemption; for as, in a case of *Kilābat*, a title to freedom is established before the payment of the ransom, [the consideration of *Kilābat*,] the master is therefore accounted to have adopted the mode of redemption immediately upon concluding such contract.

If a master sell his offending slave to the offended person, he is accounted to have adopted the mode of redemption\*. It is otherwise where he transfers the slave *in gift* to the offended person; because this person is entitled to take the slave without any recompence; and this mode of transfer is established in a case of *gift*, although not in a case of *sale*. The master is therefore accounted to have adopted the mode of redemption in one case, but not in the other.

or sell him,  
(by a valid  
sale,)

If the offended person emancipate the offending slave, on behalf of his master, by his [the master's] desire, the case is subject to the same rule as where the master emancipates the slave himself, the act of the person directed being referred to the director.

or another  
emancipate  
him on his  
behalf,

If a master strike his offending slave, so as to occasion a defect in him†, he is accounted to have adopted the mode of redemption, provided he were aware of the offence; for as, in occasioning such defect, he prevents the making over of the slave with respect to the part thus rendered defective, his making over the whole slave is thereby rendered impossible. The same rule also obtains, where a female offending slave is a virgin, and her master has carnal connexion with her, because she thus sustains a defect. It is otherwise where he merely contracts her in marriage to another person; for this, al-

or he himself  
maim him,

or (the of-  
fender being  
a virgin) de-  
flower her;

\* That is, it is taken for granted that he prefers paying the full damage (and thus redeeming the slave) to the alternative of making him over to the offended party; and consequently, he still owes the redemption-money.

† Depriving him of a hand, for instance.

though

though it occasion a defect in law, yet does not render her person defective; nor does it prevent her being made over; whence the master is not accounted to have adopted redemption in this instance. It is also otherwise where a master has connexion with his *Siyeeba* slave, being an offender; for she does not sustain any injury from such connexion. It is otherwise, also, where a master merely uses the services of his offending slave; because usufruct is not particularly restricted to right of property;—whence it is that a condition of option [in a case of sale] is not annulled by accepting services [from a slave sold under such condition.]

but not if he pawn the offender, or let him out to hire.

If a master let out his offending slave to hire, or pawn him, he is not accounted to have adopted the mode of redemption, according to the *Zâbir Rawdyet*. In the same manner, he is not accounted to have adopted the mode of redemption if he permit him to trade, notwithstanding his being in consequence involved in debt, because such permission does not prevent his making him over, nor does it occasion any defect in his person. In this last case, however, the offended person may refuse to accept the slave on his being tendered to him; for as he is, in this instance, involved in debt, by his master's permission, *he*, therefore, is bound for his value.

A master, instigating his slave to commit an offence, is accounted to have adopted the mode of redemption.

If a master offer to emancipate his slave on condition of his killing, shooting at, or wounding a certain person, and the slave act accordingly, he [the master] is accounted to have adopted, from the first, the mode of redemption. *Ziffer* is of a different opinion; because neither the offence, nor the master's knowledge of it, was established at the time of making the offer; and nothing has appeared on the part of the master, after the offence was committed, to manifest his having adopted the mode of redemption;—the case being similar to where a man suspends the divorce of his wife, or the emancipation of his slave, upon a particular condition, and then swears “that he will not divorce his wife, or emancipate his slave,” and afterwards the condition

condition aforesaid takes place; and the wife becomes, in consequence, divorced, or the slave free,—in which case, still the person is not forsworn, since nothing has proceeded from him, to occasion divorce or emancipation, subsequent to his vow. The arguments of our doctors upon this point are twofold. FIRST, the master has suspended the manumission of his slave upon the condition of his committing a particular offence; and as any thing suspended upon a condition takes place on the condition being fulfilled, the case is therefore in effect the same as if he had emancipated him after the offence.—SECONDLY, the master has incited the slave to the commission of the offence, namely, the killing, shooting, or wounding, in having caused his freedom to depend thereupon; and as the slave is naturally desirous of freedom, it is almost certain that he will perform the condition. Such instigation, therefore, evinces that the master had adopted the mode of redemption from the first.

159 (cont.)  
If a slave wilfully cut off a person's hand, and his master make him over to the offended person, either by a decree of the *Kāzee*, or otherwise, and the person emancipate him, and afterwards die of the wound;—in this case the making over of the slave is a composition in full for the offence;—in other words, the offence is remitted. It would be otherwise if the offended person had not emancipated the slave; for in this case, upon his dying, the slave would be restored to his former master, and the heirs of the deceased would then be desired either to put him to death or to pardon him. The reason of this is, that upon the wound proving fatal, without the slave being emancipated, the composition is made void; for a composition was accepted merely for this reason, that the penalty was apparently to consist of property; retaliation not being inflicted upon a slave for the members of a free person: but upon the dismemberment proving fatal, it appears that [a fine of] *property* was not incurred, but *retaliation*. As, therefore, the composition has taken place without any thing being opposed to it, it is consequently null; and retaliation is incurred of

A slave, made over for a wilful offence, and emancipated by the offended party, who afterwards dies in consequence of the offence, is not liable to answer for the death.

course.—It is otherwise where the offended person emancipates the slave; because his emancipating him evinces his design to be a *confirmation of the composition*; and the composition cannot be *confirmed*, unless it extend, not only to the offence itself, but also to every consequence of it;—whence it is that if the offended person were expressly to declare that he receives “this slave in composition for the offence, and for every consequence which may arise from it,” and the master assent thereto, the composition is confirmed.—In the case in question, moreover, the master is assenting, because, where he willingly makes over the slave as a compensation for the dismemberment, which is the *smaller* injury, it follows that he is willing to part with him as a compensation for the *loss of life*, which is the *greater* injury, *a fortiori*.—Upon the offended person, therefore, emancipating the slave, the composition implicated in the manumission is confirmed; and this being a second composition entered into *de novo*, the composition accepted at the first is null.—Where, on the contrary, he does not emancipate the slave, no second composition exists; but the first composition is void; and consequently, the slave is restored to the master; and the avengers of the offence are left at liberty either to put him to death, or to forgive him. It is mentioned in some copies of the *Jama Sagbeer*, that if a person wilfully cut off another’s hand, and then compound the matter with the dismembered person by making over to him his slave,—and the dismembered person emancipate the slave, and then die of the wound, the making over of the slave is considered as a composition in full for the offence; whereas, if the dismembered person had not emancipated the slave, the heirs of the deceased must return the slave to his master, and are then desired either to put him [the master] to death, or to forgive him. It is to be observed, however, that a difficulty arises concerning the determination in this instance; for it has been already said, that “if a person wilfully cut off the hand of another, and the wounded person forgive the dismemberment, and afterwards die, retaliation is not to be inflicted on the person who gave the wound;” whereas,

Case of a master, who having committed a wilful offence, compounds it by a making over his slave to the offended party.

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in the instance now under consideration, retaliation is declared to be incurred.—[To reconcile this apparent inconsistency,] some say that the remission of retaliation, in a case of forgiveness, (as here alluded to,) proceeds upon a favourable construction of the LAW; and that what is mentioned in the present instance (implying that the offender is still liable to retaliation) proceeds upon analogy;—whence there is, in reality, no contradiction.—Others, again, say that there is an essential difference between the cases; for the forgiveness of the dismemberment is valid and effectual in appearance, as the wounded person was entitled only to cut off the hand of the offender. The forgiveness is therefore, in appearance, complete; and although, upon the wound proving fatal, the pardon becomes void in *effect*, yet it still continues in *reality*, (that is, upon the *face* of the matter;) and its existence in this degree suffices to prevent retaliation.—In a case of *composition*, on the contrary, the composition does not do away the offence, but is rather a means of confirming it, the offended [wounded] person having agreed to a composition in property, and thus accepted a consideration for the injury he has received; and as the offence is not done away, and the consideration for it is returned, it follows that the composition does not prevent retaliation being inflicted. This is where the slave is *not* emancipated;—for where he is emancipated, the case is subject to the rules before stated.

If a licensed slave, involved in debt to the amount of one thousand *dirms*, kill a man, and his master afterwards emancipate him without knowing of the murder, he is liable to pay the value of the slave twice, once to the creditors, and once to the heirs of the slain; for he has invaded two different rights,—the right of the heirs, (which is, that the slave be made over to them,)—and the right of the creditors, (which is, that the slave be sold for payment of his debts;)—and as he would be responsible for the whole value, from invading either of these rights where they occur separately, he is in the same manner responsible for each where they occur jointly.

A master emancipating his offending slave, involved in debt, is liable to pay his value twice, —to the creditors, and to the avenger.

E e e 2

OBJECTION.

OBJECTION.—It would appear that the two rights cannot possibly be united, so that both should be satisfied by means of the slave's person; for if the slave were made over to the heirs [the avengers of blood,] he could not be sold on behalf of the creditors; and *vice versa*.

REPLY.—The two rights *may* be united, in this way, that the slave be first made over to the heirs, and then sold on behalf of the creditors.

OBJECTION.—If the slave is to be sold on behalf of the creditors, where is the advantage in making him over to the heirs?

REPLY.—The advantage is, the establishment of the right of the heirs to release the slave upon payment of a redemptionary atonement.

—As, moreover, the slave committed the offence at a time when he was occupied by debt, he is consequently made over under the same predicament.—The master, therefore, is responsible for both the rights, as having invaded both.—It is otherwise where a stranger\* kills, by misadventure, a slave of this description, (that is, *involved in debt*;) for in this case the stranger owes merely the single value of the slave, which he must pay to the master, who again delivers the same over to the creditor; because the stranger is *a priori* responsible to the master, the slave being his property; and as the creditor's right (to a *transfer* of the slave) is weak in comparison with the *master's* right (to the *property* of him,) it consequently cannot come in competition with it, the case being, in fact, the same as if no other right were involved. But the creditor is afterwards entitled to take the value from the master, as this value is the worth of the slave, and the creditor's right in the worth precedes the right of the master, it being incumbent on him [the master] to set up the slave to sale, for the discharge of his debts. This (it is to be observed) is where the slave is merely involved in debt, without having committed any offence; for if he had com-

\* Meaning, any person not concerned in the slave, as his *creditor*, or so forth.

mitted

mitted an offence, and a stranger slay him by misadventure, the master must in that case pay the value of him to the avengers of the offence, and also to the creditors; but the stranger is only to pay the value to the master, in the manner above mentioned. In the case of emancipation, on the contrary, the master owes twice the value to the parties; because he has invaded the rights of both; and as the right of one has no preference over that of the other, an equal regard is paid to the rights of both, and the master consequently owes each a compensation.

If a licensed *female* slave, involved in debt, bring forth a child, she is liable to be sold, together with her child, for the discharge of her debts;—whereas, if she commit an offence, the master is not required to make over her child, as well as herself, to the avengers of the offence. The difference between these two cases is that, in the former, as the debt, in the contemplation of the LAW, is due from the person of the slave, (in this way, that the discharge is to be effected by means of her person,) *debt* is therefore her legal description; and as every legal description appertaining to the person extends to the *offspring* of the person, the slave's debts, therefore, extend to and affect her child;—in the same manner as where a man pawns his female slave, and she brings forth a child; in which case the child also is comprehended in the contract of pawn. It is otherwise in a case of offence; because an offence committed by her requires that she be made over in compensation for it; but as that is a matter which rests upon the master, not upon the slave, the *obligation of transfer* (being the legal description) applies to the master, not to the slave, she not encountering any thing except merely the *effect* of the transfer, which is a certain predicament, not the *legal description*, or, in other words, the *obligation of transfer*;—and a *certain predicament* extends to the child, not a mere *legal description*.

The child of a licensed female slave is made over with herself in discharge of her debt, but not in satisfaction of her offences.

If



A person having declared the freedom of a slave cannot afterwards sue the master for any offence committed by such slave.

If a person make a declaration concerning another, that “ he has emancipated his slave,” and the slave should afterwards, by misadventure, kill a relation of that person, (as his *son*, for instance,) he is not entitled to any thing on that account ; because, in having declared the emancipation, he throws the liability to the fine upon the slave’s *Akilas*, and discharges the master from it : and his mere affirmation is not credited nor received as proof against the *Akilas*, unless it be supported by evidence :—but if he produce evidence, the *Akilas* are liable for the fine.

A freedman’s allegation of his having committed an acknowledged murder “ whilst he was a slave,” exempts him from responsibility for it.

If a master emancipate his slave, and the slave afterwards make an acknowledgment to a man, saying, “ I murdered your brother, by misadventure, whilst I was yet a slave,”—and the man assert that he had committed the murder after having obtained his freedom, in this case the allegation of the *slave* is credited, as he is a negator of responsibility, because he refers the murder to a time and situation repugnant to responsibility, and which is notorious :—notorious, as this supposes a case in which his bondage was a matter of notoriety ; and repugnant to responsibility, because, during his bondage, it would have been incumbent on his master *either* to make him over in atonement for the offence, or to release him by paying a redemption.—The case is therefore the same as where a person, being an adult, says “ I divorced my wife (or, *sold my house*, &c.) whilst I was yet an infant,”—or, being of sound mind, says “ I divorced, &c.” whilst I was insane, (his insanity having been notorious ;)—for under such circumstances his assertion is to be credited, so far as to establish the inefficacy of the divorce, or the invalidity of the sale ;—and so likewise, in the present instance, the assertion of the slave is credited, so far as to establish his exemption from responsibility.

Cases in which a master is respon-

If a person emancipate his female slave, and afterwards assert that “ he had struck off her hand whilst she was yet a slave ;” and she,

she, on the contrary, affirm that "he did so after she was free," her allegation must be credited. The same rule also holds with respect to every thing taken from a female slave by her master,—excepting only her earnings\*, and the enjoyment of her person;—for if her master were to say, "I took your earnings," or "I enjoyed you—*whilst you were my slave*," and she to reply, "nay!—you did so after I was free,"—still his allegation would be credited in either case, upon a favourable construction.—This is according to the two *Elders*. *Mohammed* alleges that the assertion of the female slave is to be credited only with respect to such things, actually existent, as a master would be required to return or account for to her; according to all authorities; (in other words, that where the master acknowledges having taken any thing then extant in his hands, he is directed to return or account for the same, and that only;) and that, with respect to any other matter, the assertion of the master must be credited. The argument of the two *Elders* is, that the master has made acknowledgment of a fact which occasions responsibility; (namely, the cutting off of a hand, or the taking of property,) as having referred his act to a time which was not repugnant to responsibility; (for a master cutting off the hand of his slave, or taking his property, is invariably responsible, in the same manner as a master who cuts off the hand of his *pawned* slave, or who takes property from his slave involved in debt;) and after having made such acknowledgment, he pleads another circumstance to exempt him from responsibility;—whence his assertion is not to be credited unless supported by evidence;—in the same manner as where a man, wanting his right eye, and having struck out the right eye of another, alleges that "the other had struck out his right eye in retaliation," and the other denies this, asserting that "he had struck out his eye at a time when he was already deprived of his own eye, and therefore owes him a

fible to his  
emancipated  
slave.

\* The example refers to a *female* slave, because of the allusion to *carnal connexion*.—The rules of it, however, equally apply to *male* slaves in all other particulars.

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“ must for his eye,”—in which case his assertion is credited, and the former owes him a fine accordingly, as having acknowledged an act which induces responsibility, (namely, the striking out of an eye,) without referring it to a time repugnant thereto; and after having thus acknowledged an occasion of responsibility, he pleads an exemption therefrom, which the other denies; and the assertion of a negator must be credited;—and so likewise in the present instance, the declaration of the female slave, who is the negator, must be credited. It is otherwise with respect to the earnings of the slave, or the enjoyment of her person; because, as a master is not liable to a fine of trespass for having carnal connexion with his slave, notwithstanding she be involved in debt, nor responsible for taking her earnings under the same circumstance,—he therefore, in these two cases, refers the act to a time which was notoriously repugnant to responsibility.

Case of an infant committing an offence at the instigation of a slave or an infant.

IF an inhibited slave, or an infant, instigate an infant to kill a man, and the infant so instigated kill the man accordingly, the fine for the man's blood is due from the infant's *Akilas*; because he has actually killed the man; and the malice or error of an infant is one and the same,—that is, a fine is incurred equally in either instance, as has been already explained. A fine is therefore imposed on the infant's *Akilas*; and nothing whatever is incurred by those who directed him, (the inhibited slave, or infant,) as they are not liable to be taken to account for their words, nothing being cognizable except what is noticed in the LAW, which pays no regard to the words of such persons. The *Akilas*, moreover, having paid the fine, are not at liberty to reimburse themselves from the infant, either at present, or after he shall have attained maturity;—they may, however, require reimbursement from the slave so directing, when he shall have obtained his freedom; for his words were uncognizable because of the right of his master, *not* because of any defect in his natural competency; and as, on his becoming free, the right of his master (which was the obstacle) no longer remains, they are then entitled

to take the fine from him. It is otherwise with an infant ; for as his words were uncognizable because of a defect in his natural competency, he is therefore not liable to be fined for the fine, either at present, or after having attained maturity.

If one inhibited slave instigate another inhibited slave to kill a man, and he kill him accordingly, it is incumbent on his master either to make him over, or to pay his fine of redemption, without, at present, demanding any recompence from the instigator: but he is at liberty, after the instigator shall have become free, to take from him the amount of whichever is the least,—the value of the slave he had made over, or the redemption he had paid for him. This proceeds upon a supposition of the slave having killed the man by misadventure,—or, having killed him wilfully, being himself an infant, as the malice and error of an infant are the same thing:—but where the slave who thus kills the man is an *adult*, and kills him wilfully, he incurs retaliation, a slave being liable to retaliation for a freeman.

Case of a slave committing a murder at the instigation of another slave.

If a slave wilfully kill two freemen, and each of those leave two heirs, and one heir of each pardon the offence, the master has it at his option either to make over a moiety of the slave to the two heirs who have *not* pardoned it, or to pay them one thousand *dirms* as a redemption for the same ; because, upon one of each two heirs granting a pardon, retaliation is remitted, and the remaining heirs are only entitled to property ; and as the shares of the pardoning heirs amount to one half, that half is remitted, and the other half remains due.

One of two heirs pardoning a slave, in a case of wilful murder, the other heir receives only his just proportion.

If, on the contrary, a slave kill two freemen, one wilfully, and the other by misadventure, and each leave two heirs, and one of the heirs of the person slain wilfully pardon the offence, and the master prefer paying a redemption, he must pay fifteen thousand *dirms*,—five thousand to the heir of the person wilfully slain who had not

A slave killing one man wilfully, and another accidentally, where one heir of the former pardons the offence, is dis-

vided among  
the remain-  
ing heirs of  
both,—or re-  
deemed, at  
his owner's  
discretion.

granted a pardon, and ten thousand to the two heirs of the person slain by misadventure;—for upon one of the heirs of the person slain wilfully pardoning the offence, retaliation is remitted, and his fellow-heir remains entitled to a fine; and therefore the two heirs of the person slain by misadventure have a right to a complete fine, namely, ten thousand *dirms*, and the heir of the person wilfully slain, who had not granted a pardon, has a right to a *moiety* of the complete fine, namely, five thousand *dirms*. If, on the other hand, the master prefer making over the slave, he is to be divided among the heirs in three portions, two going to the heirs of the person slain by misadventure, and one to the unforgiving heir of the person slain wilfully.—This is according to *Haneefa*. The two disciples, on the contrary, maintain that the slave is divided among the heirs in *four* parts, three fourths going to the heirs of the person slain by misadventure, and one fourth to the unforgiving heir of the person slain wilfully. The division, therefore, according to them, is to be determined by the litigation; in other words, in the degree in which the right of any of the parties attaches without litigation from the others, he receives a proportion; and in the degree in which the litigation obtains, the division is made equally. Now, in the case here considered, *one* moiety of the slave is reserved to the two heirs of the person slain by misadventure, without litigation on the part of any other person, and goes to them accordingly; but with respect to the *other* moiety, there is a litigation between the two heirs of the person slain by misadventure, and the unforgiving heir of the person slain wilfully; and therefore it is divided equally between the one heir on the one part, and the two heirs on the other part. The argument of the two disciples, in support of this determination, is that the right of the two heirs of the person slain wilfully is connected with the *whole* of the slave's person: but upon one of them granting a pardon, his right becomes extinct, and of course a moiety of the slave is disengaged, and the right of the two heirs of the person slain by misadventure attaches to it, without litigation, whence it goes to them; and there then remains the other moiety,

moiety, with which is connected the right of the two heirs of the person slain by misadventure, and also of the unforgiving heir of the person slain wilfully;—and as this is equally divided among them, the two former, therefore, get one half of such moiety, and the latter the other half; and thus, of the whole, three fourths go to the two heirs of the person slain by misadventure, and one fourth to the unforgiving heir of the person slain wilfully; as above stated. According to *Haneefa*, on the contrary, the slave is divided among the heirs (as above stated) in three portions, by the rule of fractional arithmetic\*; because of their right being equally connected with the slave's person†;—in the same manner as where a person dies insolvent;—in which case his estate is divided among his creditors by the rule of fractions..

If a slave held in partnership by two persons murder a man whose heirs are those two partners, and one of them pardon him, retaliation is remitted, and the blood of the slain is of no account, according to *Haneefa*.—The two disciples maintain that in this case the partner who grants the pardon must make over a portion of his share (namely, a quarter) to the other partner, or else must pay him a fourth of the complete fine of blood, as a redemptionary atonement.—The reasons they allege are, that a master is entitled to execute retaliation upon his

A slave, being held between two men in partnership, and forgiven of a murder by one of them, the bloodshed is of no account.

\* Arab. *Zirb-wa-awl*; literally, “multiplication and excess.”

† The translator here omits the *process*, which has no place in the *Arabic* version, and in fact teaches a most circuitous mode of practice for solving a very plain question. As, however, it is somewhat curious, he conceives it advisable not entirely to omit it.—“Now, the right of the heirs of the two persons slain by misadventure is ten thousand *dirms*, and that of the unforgiving heir of the person slain wilfully is five thousand.—The proposition, therefore, contains a *whole* and an *half*.—Hence we must take for the denominator the smallest number which admits of subdivision, namely, *two*, by which the fractional number [being multiplied] is resolved into three. [integral parts;]—and the two heirs by misadventure take in the proportion of the whole, namely, *two* parts; and the unforgiving heir takes in the proportion of the half, namely, *one* part.”

slave; for a master's property in his slave does not oppose his right to retaliation, the slave, with respect to his blood, remaining in the original state of MAN, namely, *freedom*.—Now, retaliation being incurred on behalf of both masters, an half of it is therefore, in an indefinite manner, incurred on behalf of each of the two; and the moiety of the half of each, respectively, is of course involved in the other's half. But upon one of them granting a pardon, the other's right to retaliation is annihilated, and he then becomes entitled to property, indefinitely, in the same manner as he had been before entitled to indefinite retaliation; and one *half* of his right, therefore, (which is a fourth of the whole,) is converted into property, with respect to his share; and then becomes extinguished *in toto*, (in other words, fails even with respect to the exchange for retaliation, namely, property,) as a master cannot be a claimant of debt against his slave; and the other half of the right (which is likewise a fourth of the whole) is converted into property, with respect to the share of the other partner, who granted the pardon, and consequently does not drop, but he is desired either to make over a moiety of his share (namely, a fourth of the slave) to his copartner, or to pay a redemption to the amount of a fourth of the fine of blood in lieu thereof.—The argument of *Haneefa* is that, as retaliation is due on behalf of both masters indiscriminately, it therefore bears the construction of being due on behalf of each in particular, with respect either to the *whole* of the slave, or the *half* of him,—in this way, that the right of each, (namely, an half) is connected with his own particular share,—or, in this way, that the right of each is connected with the other's share,—or, in this way, that a moiety of the right of each is connected with his own particular share, and a moiety with the share of his partner, indefinitely and without discrimination; and on none of these suppositions is there any obstacle to retaliation, as all the parts of a slave are alike with respect to retaliation, no one of them in regard to it being less than another.—Upon the right, therefore, of one of the masters being converted into property by the other granting a pardon, there

there is a possibility of the *whole* of his right being due to him, considering his whole right as connected with his partner's share ; and it is also possible that the whole of his right is extinct, considering his whole right as connected merely with his *own* share ; and it is likewise possible that an half of his right is due to him, considering one half of his right to be connected with his own share, and another half with the share of his partner, indefinitely ;—and hence there is a doubt with respect to the obligation on the other partner : and any circumstance of doubt, in a matter of property, prevents the establishment of a claim.

## S E C T I O N.

If a person kill a slave by misadventure, he is responsible for the value of such slave, provided it do not exceed ten thousand *dirms* ; but if it amount to ten thousand *dirms* or above, he is directed to pay ten thousand *dirms* excepting ten, (that is, nine thousand nine hundred and ninety ;) and where, on the other hand, the value of a *female* slave (supposing the one killed to be such) equals or exceeds the fine for her blood, the person who killed her is directed to pay five thousand *dirms* excepting ten.—This is according to *Haneefa* and *Mohammed*. *Abou Yoosaf* and *Shafei* maintain, that the person who kills the slave is responsible for the value to whatever amount ; because the responsibility is in consideration of the *worth* not of the *blood* ; (whence it is that it holds on behalf of the slave's *master*, who is proprietor only with regard to the *worth*, not with regard to the *blood*, with respect to which a slave is in his natural state of freedom ;) for if it were in consideration of the blood, it would necessarily follow that the slave

A slave slain by misadventure must be accounted for to the amount of his value, as far as nine thousand nine hundred and ninety-nine *dirms*.



would be the proprietor of the atonement, not the *master*.—Thus, for instance, if a slave, having been sold, be killed in the hands of the seller before the purchaser obtains possession, the contract of sale still continues in force; which evinces that the responsibility is a return or compensation for the worth; for otherwise the contract would not continue, the continuance of that being because of the continuance of the value, whether the original property remain, or only the *return* for it; and notwithstanding the original property, in such instance, no longer remain, yet still the *return* for it does so, whence the sale continues, in consideration of the continuance of the return for the article sold, namely, the *value* thereof;—whereas, if the responsibility were in consideration of the blood, the contract of sale would be entirely dissolved, since on this supposition the value of the article sold does not remain in any shape whatever. The slave in question, therefore, where his value equals or exceeds the amount of the fine for his blood, is considered in the same light as one whose value falls short of the fine\*;—or as an *usurped* slave, who, if he perish in the usurper's hands, must be accounted for at the rate of his full value, whatever that may be. The arguments of *Haneefa* upon this point are twofold.—FIRST, the word of God has imposed the fine for erroneous bloodshed unrestrictedly, (that is, in a way which comprehends [*Mussulman*] *slaves*, as well as *freemen*;) for the text of the KORAN says, “WHOSOEVER KILLETH A BELIEVER BY MISTAKE, *the penalty of it shall be* THE FREEING OF A BELIEVER, “AND A FINE, *to be paid* TO THE HEIRS OF THE DECEASED.”—A fine, therefore, is due; and as the fine is a consideration for the blood, which never exceeds ten thousand *dirms*, that sum only is due, in the same manner as holds in the case of a freeman.—SECONDLY, in the slave two different qualities are said to exist;—one, the quality of *humanity*, understood in a being endowed with understanding, reflection, apprehension, and memory; and another, the quality of *worth*,

\* That is to say, his *value* must be paid by the murderer.

understood.

understood in a subject fit for the use and purposes of the individual.—In a slave, therefore, there are two modes or characters, the character of humanity, and the character of worth\*. Now, the former of these is superior to the latter; and it is a rule that where two characters or modes occur together, disagreeing in their laws, regard must be paid to the *superior* character, not to the *inferior*. Here, moreover, it is impossible to pay attention to *both* characters; for the character of *humanity* requires that the responsibility be fixed to the amount of the fine of blood, whereas the character of *worth* requires that it extend to the whole value of the slave, to whatever amount;—and regard must be paid to the character of *humanity* in preference, as that is the superior. With respect to the case of usurpation, adduced by *Aboo Roosaf* and *Shafëi*, it is of no weight; because the responsibility, in that instance, is in consideration of *worth* only, usurpation holding only with respect to property. With respect, moreover, to what they say concerning sale, that “the contract of sale still continues, “because of the continuance of the return for the article sold, namely, “the *value* thereof,”—it is not admitted; for as a contract of sale endures even where the slave, who is the subject of it, is *wilfully* murdered in the hands of the seller, and before the purchaser has obtained possession of him, notwithstanding retaliation be not a return for worth,—so likewise in a case of fine. With respect to a slave whose value is short of the fine, there likewise the recompence for MAN is due; namely, the fine. As, however, the amount of the fine was not fixed by the LAW†, it is therefore, in this instance, estimated by

\* Arab. *Maleeat*.—We have no word in our language precisely corresponding with it. The translator (to avoid a paraphrasis) generally expresses it by the term *worth*.—It is derived from *Mâl* [property,] and signifies *the quality of being* (or constituting) *property*; and, to understand this passage, that sense must be annexed to it.

† The amount of fines is not fixed by the KORAN, but by the *Sonna*.—The reason of the distinction here is, that if it had been determined by the KORAN, it would be considered as *absolute*, and therefore not to be swerved from in any instance.

the

the value; for here it is possible to ascertain the deficiency between the recompence for the slave and the recompence for a freeman by reverting to the value, which is short of the fine; and regard is paid to that accordingly. It is otherwise where the value of the slave exceeds the fine; for it is here impossible to ascertain the deficiency with regard to the value, as that exceeds the value of a freeman, namely, the fine, which fixes the value of a freeman at ten thousand *dirms*. (The fine for a slave is established at a rate *short* of the fine for a freeman, in order to evince the inferiority of his rank; and the difference is fixed at ten *dirms*, on the authority of *Abdoola Ibn Abbas*.)

The hand of a slave is accounted for at the rate of half his value, as far as four thousand nine hundred and ninety-five *dirms*.

For the hand of a slave half his value is incurred, provided that do not exceed four thousand nine hundred and ninety-five *dirms*; the hand of a man being equivalent to half his person. In short, the value, with respect to a slave, is the same as the fine with respect to a freeman; and therefore, in all cases where a fine is due for a freeman, the value is due for a slave; where an half fine is due on account of the one, an half of the value is due on account of the other; and so forth;—because the value of a slave is similar to the fine for a freeman, as being (like that) a recompence for his blood.

Case of a slave who being maimed, and then emancipated, dies of the wound.

If a person wilfully strike off the hand of a slave, and the slave's master afterwards emancipate him, and he then die in consequence of the maiming, in that case, provided the freedman have other heirs besides his master, retaliation is not incurred by the offender;—whereas, if he have no other heirs, it must be inflicted. This is according to *Haneefa* and *Abou Yoosaf*. *Mohammed* maintains that retaliation is not incurred in either case; but that a mulct for the hand is due from the maimer, together with any deficiency occasioned, by the maiming, in the value of the slave, between the time of dismemberment and emancipation,—and the rest of his value is altogether remitted. Thus, for instance, if the value of the slave, at the time of

of dismemberment be one hundred *dirms*; in this case one half of his value [fifty *dirms*] is incurred by the dismemberment, and then, if, at the time of his emancipation, his value have diminished to the amount of ten *dirms*, those ten are also incurred; and thus sixty *dirms* are due, and forty are remitted. Retaliation is not incurred on the former supposition, [that is, supposing the freedman to leave other heirs besides his master,] according to all the doctors; because it is in this case uncertain who is the claimant of right; (for retaliation is incurred on the occurrence of the death, that being at the same time referable to the wound; and therefore, if regard be paid only to the time of the wound, the master is the claimant; or if, on the other hand, regard be paid to the time of the death, the heirs are the claimants;) and such being the case, it is impossible to exact retaliation, which therefore utterly ceases,—inasmuch that if both parties [the master and the heirs] were to unite in claiming retaliation, still it is not to be inflicted, as their coalition does not dispel the doubt, the right of the master having existed at the time of the wound, not at the time of the death, and that of the heirs (on the contrary) at the time of the death, not at the time of the wound.—The reasons alleged by *Mohammed* why retaliation is not to be inflicted in the instance in which he differs from the two *Elders*, (that is, where the slave leaves no other heirs than his master,) are twofold.—FIRST, the grounds of authority for exacting retaliation are here various; for, looking to the time of the wound, the ground is, the master's right of property in his slave; whereas, looking to the time of the death, it is, the *Willa* of manumission\*; and a diversity in the grounds is the same as a difference in the claimants, in all matters where caution is necessary, such as punishment or retaliation, or as where, for instance, a man says to the owner of a female slave, “You have sold me this slave for so much,” and the other replies, “No! I have contracted her to you in marriage,”—in which case it

\* Which entitles the emancipator to seek satisfaction for the death of his freedman. (See Vol. III. p. 436.)

is not lawful for the man to have connection with the slave, as the grounds of her claim are different, since, looking to sale, it is *right of property*, and looking to marriage, it is the *connubial* right.—SECONDLY; the emancipation precludes the consequence\*; and because of the consequence being thus precluded, the wound remains independent of its consequence, and the consequence occurs independent of the wound, the case being the same [on the slave's afterwards dying] as if he had perished by the visitation of heaven;—whence retaliation is prevented.—The arguments of the two *Elders* are that although the two grounds of claim be contrary, yet the master has an undisputed authority to exact retaliation, that appertaining to him in every view; and the legal effect of both grounds is moreover one and the same, namely, retaliation;—thus the claimant, (namely, the master,) the thing claimed, (namely, retaliation,) and the person upon whom the claim is made (namely, the offender) are known and ascertained; and as the exacting of retaliation is therefore possible in this instance, it must be decreed accordingly.—The difference in the grounds of claim, moreover, are not to be regarded in this instance, as it does not occasion any difference in the legal effect.—It is otherwise on the first supposition†; for there the claimant is unknown.—It is also otherwise in the case of the female slave; because there the legal effect differs according to the difference in the grounds of legality; for the right of property is different from the right of marriage in point of legal effect, the legality of connexion established by a contract of marriage being a thing essential to and involved in it, whereas the same legality established by a right of property is not an essential, but merely follows as a dependant. With respect, also, to what is advanced by *Mohammed*, that “the emancipation precludes the conse-

\* Arab. *Sirrâyet*.—The definition of this term has been given before. (See p. 344.) The meaning of the phrase here is, that the emancipation precludes the legal effect of the slave's death taking place upon the offender.

† That is, supposing the freedman to have other heirs besides his emancipator.

"quence," it may be replied, that the emancipation precludes the consequence only because of its rendering the claimant doubtful and unknown. Now *that* holds only in a case of *misadventure*, not in a case of *malice*. In other words, if a person cut off the hand of a slave by misadventure, and the dismemberment prove fatal after manumission, retaliation is not incurred, but a fine for the *hand* only, together with the diminution occasioned in the slave's value by the maiming between that time and his emancipation, because it is in this case uncertain who the claimant of the right is, a slave being incapable of possessing property; and therefore, looking to the time of the wound, the *master* is the claimant of the right;—whereas, if the time of the *death* be regarded, the *slave* is the claimant, as he is then free;—and regarding, also, the time of the wound, the *value* of the slave is incurred; but regarding the time of the death, the fine of blood is incurred as he is then free. The claimant, and the thing claimed, are therefore both uncertain in this case;—and as an ignorance concerning the *claimant* alone prevents the consequence, it follows that an ignorance concerning both the claimant and the thing to be claimed prevents the consequence, *a fortiori*. In a case of *malice*, on the contrary, the legal effect is retaliation; and as a slave stands, with respect to his blood, in the original state of MAN, namely, freedom, he is therefore entitled to retaliation; but this is to be exacted by his emancipator, as being the avenger of his blood; and as the freedman [in the instance here supposed] leaves no other heirs besides his master, the claimant of the right, therefore, is known and ascertained.—It is to be observed, that as, according to *Mohammed*, retaliation is prevented in both cases, a fine is due for the hand, together with the diminution occasioned in the value of the slave on account of the time elapsed between the wound and the emancipation, (as already mentioned,) because the wound was given during the master's right of property;—and nothing beyond those is allowed. According to the two *Elders*, on the contrary, in the first of those cases only a fine

for the hand is due, together with the diminution occasioned in the value, as aforesaid.

Case of an injury inflicted on two slaves, after the master indefinitely declares *one* of them free.

If a master say to two of his slaves, "one of you is free," and a person then strike and wound both the slaves upon the head, and the master afterwards specify the one whom he designed to emancipate by the above speech, still he is entitled to the recompence for the offence committed upon both; for he emancipated an *unspecified* slave; and the wounds have been received by *specific* slaves; and as what is *specific* is *one* thing, and what is *unspecified* is *another*, they are *both*, therefore, his property, with respect to the offence. If, on the other hand, a person were thus to *slay* the two slaves in question, he incurs a fine for the one emancipated\*, (payable to his heirs, if he leave heirs, or otherwise to the master,) and the value of him who was to have remained in bondage, payable to the master,—provided that the murderer be one person, and have slain the *two together*, (not *successively*,) and that the value of both be equal†. If, on the contrary, the two slaves be murdered by the one person *successively*, (that is, one after the other,) he incurs the value of the *one first slain*, payable to the master, and a fine for the other, payable to his heirs; because, by one of them being slain, the emancipation is, of necessity, determined to the other. If, on the other hand, the two be slain by the one person *together*, and they be of different value, the murderer incurs a moiety of the value of each, respectively, together with a fine for a freeman; because he has, to a certainty, killed a freeman and a slave; and the murder of the one subjects to a fine, and of the

\* That is, the one to whom the master afterwards explains his indefinite emancipation to have applied.

† The reasons for this distinction between a case of murder and of wounding are here stated at large.—The translator, however, conceives himself justified in omitting them, as they involve a long train of metaphysical subtleties of no use, and the substance of which are to be found under the head of *Indiscriminate Manumission*. (See Vol. I. p. 456.)

other

other to the value; and neither of them precedes the other. The murderer, therefore, in this instance, owes one half of the value of each, together with an half of the *fine* for each; for as, in consequence of the death of both, no subject remains for the master's explanation, the emancipation indiscriminately pronounced by him applies in an indefinite manner to each.

If a person put out both the eyes of another's slave, the owner has it in his option either to make over the slave to the offender, taking from him the value, or to retain the slave, without getting any thing for the defect thus occasioned in him. This is the doctrine of *Haneefa*. The two disciples maintain that the master has it in his option either to keep the slave, taking a compensation for the damage he has sustained, or to give him to the offender, taking the whole of his value. *Shaf'ee*, on the contrary, holds that the master is entitled to keep the slave, taking, at the same time, his complete value; for as the responsibility is opposed to what is *destroyed*, not to what *remains*; (in the same manner as in the case of a *freeman*,) this remainder, therefore, still continues the property of the master;—as where, for instance, a man strikes off one hand of a slave, and puts out one of his eyes; in which case the offender incurs the whole value of the slave, who still remains with his master; and so here likewise. (It is proper to observe, in this place, that our doctors maintain that worth\* exists in the person; but regard is also paid to it with respect to the members of the body, for otherwise any regard to it with respect to the person (so as to be confined to that alone) must be nugatory, since as the members of the body are held equivalent to property, for the security of the body†, it follows that a regard to the worth,

Case of a person putting out the eyes of another's slave.

\* *Malerat*; it has been already explained to signify the *quality of being property*.—This whole passage is somewhat enigmatical, and (to understand it properly) requires that a strict attention be paid to the context.—It is altogether detached from the question in dispute.

† With a view to protect the body from the injuries it might otherwise be liable to, in its



worth, in the members, is of prior consideration. As, therefore, worth is regarded in the members of the body, as well as in the person, and, in the case in question, the person also is destroyed in some degree, (for one of the bodily faculties has been totally destroyed,) and the responsibility is (consequently) to the amount of the complete value, it is requisite that the offender become proprietor of the body of the slave, in order that he may not be subjected to injury, and that an equality may be established. It is otherwise where a person puts out both the eyes of a freeman; because a freeman does not possess the quality of *worth* \*. It is also otherwise where a person puts out the eyes of a *Modabbir*; because a slave of that description is incapable of passing from the property of one person to that of another. It is likewise different where a person strikes off one hand of a slave, and puts out one of his eyes; for in this case no one faculty is completely destroyed.) The argument of the two disciples is, that as the quality of *worth* exists in the slave, and as the situation to which the slave is reduced admits of two different constructions,—a destruction of the person †, or a destruction of the members,—it is therefore requisite that the master have it at his option either to deliver over the slave, and take the full value, on the *former* of these constructions; or, on the *latter* construction, to keep the slave, and take a compensation for the damage he has sustained ‡; as in all other cases of property;—this being analogous to where a person tears another's robe to pieces, in which case the owner of the robe has it at his option either to make over the robe and take the value, or to retain the robe and take a compensation for the damage. The argument of *Haneefa* is that, although

*its members*, owing to the carelessness or incautiousness of others;—for if the members were not held equivalent to property, (in other words, if no fine were imposed for injuries to them,) the body (of which the members are a part) would not be effectually protected.

\* In other words, “ *does not possess the capacity of being property.* ”

† Because a complete destruction of one of the faculties is accounted a destruction of the whole man.

‡ Literally, “ *and take the difference occasioned in his value.* ”

*worth*

*worth* be regarded both in the person and in the members of the body, still the character of HUMANITY also exists in the person and members of a slave, and has not been totally extinguished by his bondage. Now, it is to be observed that one of the rules of HUMANITY is, that the penalty incurred by an offence be *not* divided between the person and the member destroyed, but opposed to the latter alone; and (consequently) that the property of the body\* be not transferred, (as where, for instance, a person puts out both the eyes of a *freeman*;) and that therefore the master is to take the whole value in compensation for the thing destroyed, the body remaining as it was;—and, on the contrary, one of the rules of *worth* is, that the compensation for an offence be divided between the whole person and the particular member destroyed; and that therefore the master is to take the defect occasioned in the value, as a satisfaction for the member destroyed, at the same time keeping the body [*yussû*] as before. We therefore (says *Hanefsa*) pay attention to both these characters; and accordingly, looking to the character of HUMANITY, we determine that the compensation is *not* divided (as above,)—for if we were to say that the master is to take the difference occasioned in the value, and retain the body [*yussû*,] it would induce a total neglect of the character of HUMANITY, and would cause the character of *worth* alone to be regarded, (as is determined by the two disciples;)—and looking, on the other hand, to the character of *worth*, we determine that the master is not at liberty to take the whole of the value, and also retain the person of the slave, (as is determined by *Shafci*;) for in this case a regard is paid to HUMANITY alone, and the regard to *worth* is altogether lost.

\* *Amb. yussû*.—It is defined, by the *Arabian* lexicographers, “*the figure of a man*,” meaning (perhaps) a man independent of his qualities or faculties; and it therefore applies to a *mutilated* as well as to a *complete* body,—whence the use of it in this place.

## SECTION.

## Of OFFENCES committed by MODABBIRS and AM-WALIDS\*.

The master of a *Modabbir* or *Am-Walid* is accountable for their offences, to the smallest amount between the fine and the value.

If a *Modabbir* or *Am-Walid* commit any offence, the master is accountable for the least of the two, the value of the offender, or the fine for the offence.—The master is thus accountable; because it is recorded of *Abou Abeeda* that he once decreed the offence of a *Modabbir* to be accounted for by his master; and also, because, as the master, by having constituted the offender a *Modabbir* or an *Am-Walid*, counteracts (as it were) the regulation of making him [or her] over, the case is therefore, in effect, the same as if he had so done after the offence, and at a time when he was not aware of it.—He is also accountable for the least of the two, the value, or the fine, (as above,) because the avenger of the offence is not entitled to any thing beyond the FINE for it; and the master, by having constituted the offender a *Modabbir* or *Am-Walid*, counteracts the regulations merely to the amount of the value, not with respect to more than the value.

OBJECTION.—The avenger of the offence not being entitled to any thing more than the fine, and the master (by having constituted the offender a *Modabbir* or *Am-Walid*,) having counteracted the regulation merely to the amount of the value, it would follow that the master should have it in his choice to give either the value or the fine, in the same manner as, in the case of an absolute slave, the master has it in his choice either to make over the slave, or to pay the redemption.

REPLY.—An option in this instance is attended with no manner of advantage, as the fine for an offence and the value of a slave are of

\* That is, by *untransferable* slaves.

the

the same kind, and it is certain that the master will chuse that which is the smallest.—It is otherwise in the case of an absolute slave; for as a slave is a specific article, and men frequently feel an attachment to such, it is therefore possible that, in this instance, the master might prefer paying the redemption, although that be more than the value of the slave; and hence there is an advantage in leaving him an option.

THERE is no fine incurred for the numerous offences of a *Modabbir*, beyond one payment of his value, notwithstanding they be committed in immediate succession; because the master, by having created his slave a *Modabbir*, has counteracted the regulation with respect only to one individual slave; and also, because paying the value is equivalent to giving up the slave; and as a master cannot make over his slave more than once, so in the same manner he is not required to pay the value more than once.—When, therefore, a master pays the value of his *Modabbir* on account of several distinct offences, the avengers of the offence are to divide it among them, each taking in proportion to his respective share.—It is to be observed, however, that as regard must be had to the value the *Modabbir* bore at the time of the offence, attention is therefore to be paid, on behalf of each claimant, to his value on the day in which the offence was committed on him, as it is on that day that the opposition of the master operates.—Hence if a *Modabbir* kill a person by misadventure, at a time when his value is one thousand *dirms*, and afterwards kill another by misadventure, at a time when his value has increased to fifteen hundred *dirms*, the heir of the first slain person is not entitled to any proportion out of the excess five hundred, but that goes entirely to the heir of the second slain person, and the two share the remaining thousand between them, according to their respective rights.—Now the right of the first is to ten thousand *dirms*, and the right of the second to nine thousand five hundred *dirms*, (for he has received five hundred.) The whole right of both is therefore to be divided into thirty-nine equal lots, each lot

The highest penalty, for numerous offences of a *Modabbir*, is one payment of his value;

corresponding with five hundred *dirms* of the complete fine; and consequently the first heir gets twenty lots, and the second nineteen.

nor is the owner responsible for any thing on account of his future offences, after having made such payment;

If a *Mobabbir* commit an offence\*, and his owner pay the value of him to the avenger of the offence, by order of the magistrate, and the same *Modabbir* afterwards commit another offence, the owner is not accountable for any thing, because, in before paying the value, he acted upon compulsion, in consequence of the magistrate's order. The second avenger, however, is in this case entitled to share the value with the first avenger. If, on the contrary, the owner have paid the value to the first avenger without an order from the magistrate, the second avenger has it in that case at his option either to require a fine for the offence from the master, or to have recourse to the first avenger for his proportion of the value. This is according to *Hanaefa*. The two disciples maintain that, in this last instance, the second avenger has no claim whatever on the master; because he [the master] has already paid all that was incumbent on him to a proper claimant, as at that time no second offence had taken place. The argument of *Hanaefa* is that as the owner of the *Modabbir* has unjustly given to the first avenger what is the right of the second avenger, and as the first avenger (on the other hand) has unjustly taken the same, the second avenger has therefore an option, as above. The ground of this is that the second offence is, in the eye of the LAW, associated with the first in one shape; for the second avenger is made to participate with the first;—and the second offence is also, in the eye of the LAW, a *follower* of the first, in another shape; for, with respect to the second avenger, regard is paid to the value of the *Modabbir* at the time of the second offence. The second offence, therefore, is considered as associated with the first, so far as regards taking the compensation either from the master or from the first avenger, be-

\* Always meaning *homicide by misadventure*, this being the only offence which involves the slave's value.

cause

cause of each of them having disregarded the right of the second avenger, in order that a due attention may be paid to both points of view, —to the *non*-association, where the value has been given [to the first avenger] by order of the magistrate, and to the association, where it has been given without his order ;—for it is not possible that the second avenger should have it in his choice to take his compensation from either party, except where the two offences had been perpetrated together.

If a *Modabbir* commit a variety of offences, and his owner then emancipate him, he [the owner] is not accountable for more than one payment of his value ; because he was subjected to this responsibility only in consequence of having constituted the offender a *Modabbir*, an act *a priori* ; and his emancipating him, or otherwise, afterwards, is one and the same. (It is to be observed that an *Am-Walid* is considered in the same light as a *Modabbir*, with respect to all these rules.)

nor for more than one value, where he emancipates him after a variety of offences.

A *MODABBIR*'s acknowledgment of an offence by misadventure is not admitted, nor does it subject the master to any penalty, whether he have emancipated him or otherwise ; because the penalty for any offence by misadventure, committed by a slave, rests upon his master ; and the master is a different person from the *Modabbir* ; and therefore the acknowledgment of the latter, as tending to effect another than himself, is not valid.

His acknowledgment of an offence is not cognizable.

## C H A P. V.

Of Offences committed upon usurped Slaves, or Infants,  
during the Usurpation.

A person  
usurping a  
maimed slave,  
who after-  
wards dies,  
is responsible  
for the value  
he bore when  
maimed;—  
but he is not  
responsible  
for any thing  
if the slave  
was maimed  
(by his mas-  
ter) after the  
usurpation.

**I**F a master strike off the hand of his slave, and a person then usurp such slave, and he die in the usurper's possession in consequence of the dismemberment, the usurper is accountable for the value he bore after he was maimed. If, on the contrary, a person usurp a slave, and the slave's master then strike off his hand whilst in the usurper's possession, and the slave die in consequence, the usurper is not responsible for any thing. The reason of the distinction here made is that usurpation (as being in itself a cause of property, where a compensation is paid by the usurper) precludes the consequence; and therefore, upon the usurpation taking place between the offence and its consequence, the latter is put out of the question, (in the same manner as where a *sale* intervenes between the offence and its consequence;) whence the matter stands upon similar ground as if, the person having usurped the maimed slave, he [the slave] were afterwards to die by the visitation of heaven;—and accordingly, the value he bore when maimed is due. In the second instance, on the contrary, as nothing has occurred between the offence and its consequence, to preclude the latter, that is therefore immediately referred to the dismemberment committed by the master, and he is considered the immediate destroyer of the slave,—whence the case is as if he [the master] had taken back the slave from the usurper, (as having performed an act upon

upon him,)—and the usurper is consequently exempted from responsibility.

If an inhibited slave usurp another inhibited slave, and such slave die in the usurper's hands, he [the usurper] is responsible, as an inhibited slave is liable to be prosecuted for his acts.

One inhibited slave usurping another, who dies, is responsible.

If a person usurp a *Modabbir*, and the *Modabbir* commit an offence whilst in the usurper's hands, and be afterwards restored to his master, and then commit a second offence, in the master's hands, the master is in that case accountable to the two avengers of offence for the *Modabbir*'s value, which is shared equally between them;—for it is out of the master's power to make over the offender, because of his having constituted him a *Modabbir*; and he has therefore, by that act, annulled the right of the avengers: but as he has been guilty of this obstruction with respect to *one* body only, he therefore is accountable for no more than one value. The value, moreover, is divided equally between the avengers, because the case proceeds on the supposition of both the offences inducing the same penalty, and the *Modabbir* bearing the same value at the time of each respective offence. Upon the master, however, thus paying the value to the two avengers, he is to take one half of the value from the usurper, as having paid the same on account of an offence perpetrated [by the *Modabbir* whilst] in his possession; and this he is to pay to the avenger of the first offence; after which he is again entitled to take the same, a second time, from the usurper. This is according to the two *Elders*. *Mohammed* says that the master is to resume one half of the value from the usurper, which he is to retain with himself, (that is, he is not to make it over to the first avenger;) because what he thus takes from the usurper is in lieu of what he has paid to the first avenger, and he therefore is not required to pay this also to him; for if so, it follows that the consideration and the return unite in one person, which is unlawful; and it also follows that the claim is repeated, as what the master takes from

Case of a *Modabbir*, being usurped, and committing an offence, and then, being restored to his master, committing another offence.



from the usurper is in lieu of what rests with the *first* avenger, not in lieu of what rests with the *second*; and therefore his paying the same to the first avenger a second time induces a reiteration of claim. The argument of the two *Elders* is, that the right of the first avenger extends to the *whole* value of the slave; for as, at the time of the first offence, no other offence had taken place, there is therefore no prevention \* from the second offence, the only circumstance which could trench upon or lessen the first avenger's right. The master, therefore, being thus possessed of something in consideration of the slave, unoccupied by any other claim, the first avenger is entitled to take it, in order to the completion of his right; and upon his so doing, the master is again to reimburse himself for the same from the usurper, as the first avenger took it from him on account of an offence committed by the *Modabbir* whilst in the usurper's hands,

Case of a  
*Modabbir*,  
first committing an offence with his master, and then, being usurped, committing another with the usurper.

IF, on the other hand, a *Modabbir* first commit an offence whilst in the possession of his master, and then a person usurp him, and he commit another offence whilst in the possession of the usurper, the master is accountable to the two avengers of offence for his value, which they share equally between them; and he is entitled to reimburse himself for half the value from the usurper, for the reasons explained in the preceding example. As, however, in this instance, the master takes the half, as aforesaid, on account of the *second* offence committed in the usurper's hands, not on account of the *first* offence, he is to make this over to the first avenger, but cannot reimburse himself from the usurper a second time;—and this according to all authorities. The ground of distinction between this and the preceding case (according to *Mohammed*) is that, in the former, if the master were to pay that half of the value, which he takes from the usurper, to the first avenger, it induces an union of the consideration and the return in one person, as has been already stated;—whereas,

\* Arab, *Menzahimat*. The meaning is, *preventing a thing from taking its full effect*.

in the latter, this consequence is not induced; because, as the first offence was committed in the master's hands, what he takes from the usurper is therefore on account of the *second* offence, that having been committed in the hands of the usurper; and hence, his making over this to the first avenger does not induce an union of the consideration and the return in one person.

If a person usurp the slave of another, and the slave commit an offence whilst in the usurper's possession, and the usurper afterwards restore him to his master, and the slave then commit another offence whilst in his master's hands, the master must resign him to the two avengers, and is then to take an half of his value from the usurper and make it over to the *first* avenger,—and is again entitled to reimburse himself for such half from the usurper. (This is according to the two *Elders*. *Mohammed* maintains that he is to take the half from the usurper, and retain it for his own use, without any further process.) If, on the contrary, the slave first commit an offence in the hands of his master, and a person then usurp him, and he commit an offence in that person's hands, his master must make him over to the two avengers, in equal shares; and must then take an half of his value from the usurper, and pay it to the first avenger; but is not again to reimburse himself, for this half, from the usurper. The reason of this distinction has been already assigned; for there is no other difference between this, and the case of the *Modabbir*, than that here the master is to make over the slave,—whereas, in the other instance, he is to pay the value of the *Modabbir*.

Case of a slave, usurped, committing an offence with the usurper, and then, being restored, committing another with his master.

If a person usurp a *Modabbir*, who commits an offence whilst in his possession, and he then restore him to his master, and again usurp him, and the *Modabbir* again commit another offence in his possession,—the master is in this case to pay his value to the two avengers, in equal shares;—for as the master, in having constituted his slave a *Modabbir*, counteracts the regulation [of resigning him] only with respect to the single

Case of a *Modabbir*, usurped, offending, restored, again usurped (by the same person,) and again offending.

single individual, he is therefore accountable only for one payment of his value. But he is then entitled at the same time to take such value from the usurper, as both the offences were committed in his hands;—after which he is to pay an half of such value to the first avenger; because the first avenger is entitled to a complete value, since at the time of the first offence no other offence had taken place, so as to interfere or prevent this; and his right is not lessened by any *subsequent* prevention; and therefore, where he finds an half of the value of the slave in the master's hands, unoccupied by any other claim, he is entitled to possess himself of it;—and the master is again to reimburse himself for this from the usurper, (the first avenger having taken it from him on account of an offence committed in his [the usurper's] hands) and to retain what he thus recovers for himself; for he is not required to pay it to the first avenger, as *he* has already received his full right,—nor to the *second*, as he never was entitled to more than the *half* value, because of the priority of right of the first avenger, and has already received all he could claim.

A person  
usurping an  
infant is re-  
sponsible if  
he die in his  
hands by any  
accident.

If any person usurp a free-born infant, (that is, take him away, without the consent of his guardian,) and the infant die, either suddenly, or of any disorder (such as a *fever* for instance,) the usurper is not responsible,—whereas, if he die by a stroke of lightning, or the bite of a snake, the usurper's *Akilas* are accountable for the complete fine. This proceeds upon a favourable construction. Analogy would suggest that there is no responsibility in either instance, (and such is the opinion of *Ziffer* and *Shafëi*,) because usurpation cannot be established with respect to a freeman, inasmuch that if the infant usurped be a *Mokâtib*, still the usurper is not accountable for any thing, notwithstanding a *Mokâtib* be free with respect to *possession* only\*; and as the infant in question is free in point both of *possession* and *person*, re-

\* A *Mokâtib* differs from an absolute slave, in this particular (among others,) that he is capable of holding property in his own right.

responsibility

sponsibility for him is not incurred *a fortiori*. The reason, however, for a more favourable construction, in this instance, is that although the usurper be not responsible on account of the *usurpation*, yet he is so on account of the *destruction*, as that is referred to him, he having taken the infant to the place where the snake was, or the lightning fell; for those are not to be met with in *every* place; and consequently, in taking the infant thither he was guilty of a transgression, and rendered fruitless the care of the guardian. The death of the infant is therefore, in this instance, referred to the usurper, in the same manner as in the case of digging a well; and this (as in that instance) is *homicide by an intermediate cause*. It is otherwise where the infant dies suddenly, or of some disease; for in this there is no difference from a difference of place. If, however, the usurper carry the infant to a particularly unhealthy spot, and the infant die of any disorder contracted there, the *Akilas* are accountable for the fine, as the death, in this instance, bears the construction of homicide.

If a person place his slave in deposit with an infant, and the infant kill such slave, his *Akilas* are accountable for the fine, (that is, the value of the slave;) whereas, if a person place a quantity of wheat (for instance) in deposit with an infant, and the infant consume such wheat, he is no way responsible. This is according to *Haneefa* and *Mohammed*. *Abou Yoosaf* and *Shafei* allege that the infant is equally responsible in either case. In the same manner, if a person place a quantity of wheat in deposit with an inhibited slave, and the slave consume the same, he is not then immediately responsible, according to *Haneefa* and *Mohammed*, but is liable to account for it after he shall have obtained his freedom; whereas, according to *Abou Yoosaf* and *Shafei*, he is then accountable. The same difference of opinion also prevails between those doctors where a person *lends* any article, or money, to a slave or an infant, and the slave or infant destroy the same. The argument of *Abou Yoosaf* and *Shafei* is that the infant has destroyed the property of another without his consent; and as this

An infant trustee is responsible for the destruction of the deposit, but not for the consumption of it.

property, is valuable, and protected on behalf of the owner, the destroyer is therefore responsible for it,—in the same manner as where a person places his slave in deposit with an infant, or where a stranger destroys property placed in deposit with an infant. The argument of *Haneefa* and *Mohammed* is that as the infant has destroyed a property which was not in protection, he therefore is not responsible, any more than if he had destroyed it with consent of the owner;—and the property is not in protection, in the present instance; because the protection of property is established on behalf of the owner of it. As, also, the owner in question has placed his property with a person incapable of protecting it, and we are forbidden, by the LAW, to place our property in deposit with such, he [the depositor] is not entitled to look for an attention to his interest unless he depute some person as his substitute to take care of it; and in the present instance he has not done so, since his making the infant his substitute is invalid, he having no authority over the infant, nor the infant over himself. It is otherwise with an adult, or a licensed slave; for they have a power over themselves. It is also otherwise where a slave is placed in deposit with an infant, and the infant kills such slave; for the protection of a slave is founded on his natural right, a slave being in his original state of freedom with respect to his blood. It is likewise different where a stranger destroys property placed in deposit with an infant; for here the proprietor has remitted the protection of the property in reference to the *infant*, but not in reference to any *other* person.

An infant or slave is responsible for the destruction of any property not lent or entrusted to them.

IF an infant or inhibited slave destroy the property of any person, the responsibility rests upon the destroyer, provided the owner have not either lent such property to them, or deposited it with them in trust; because infants and inhibited slaves are liable to persecution for their acts, although their will be of no account,—no regard being paid to this circumstance in any matter affecting the rights of the individual.

CHAP.

## C H A P. VI.

Of *Kiffâmit*, or the Administration of Oaths.

WHERE a person is found slain in any district \*, and it is not known who was the murderer, and his heir demands a satisfaction for his blood from the inhabitants of the district, or from any number of them not specifically named, fifty of the inhabitants, selected by the heir, must be put to their oaths, and depose to this effect,—“ by God I did not kill him, nor do I know his murderer.”—*Shafëi* maintains that if there be any stain † upon the place, the heirs of the slain must make fifty depositions, to this effect, that “ the people of such a district have slain such an one, their relation,”—after which a decree is granted against the defendants, awarding a fine to the plaintiffs, [the heirs of the slain,] whether they claim for wilful murder, or for homicide by misadventure.—(*Mâlik* holds that if the claim be for wilful murder, retaliation is to be decreed ‡; and there is also one opinion recorded from *Shafëi* to the same effect.)—By the “ stain [*Lâwis*] upon the place,” as mentioned above, is to be under-

Upon a person being found slain, fifty exculpatory oaths are administered to the people of the district;

\* Arab. *Mabla*.—It signifies, in its general acceptation, any place of residence whatever.—In matters of law, revenue, &c. it is used to express a district of the smallest class, such as the ward or quarter of a city, a parish, &c.

† The meaning of this will be explained a little further on.

‡ This can only mean where the depositions of the heirs point at some particular person, (such as one upon whom any thing is found to induce suspicion,) for it is scarcely possible that he should argue for retaliation, either upon the whole district, or upon any individual unspecified. The arrangement of this passage is somewhat obscure both in the Arabic and the Persian version.

stood (according to the exposition of *Málik* and *Shaféi*) any signs of murder being found upon a particular person, such as a *bloody scymiter*, for instance,—or, apparent circumstances testifying for the plaintiffs, such as a notorious enmity having subsisted between the inhabitants [or any individuals of them] and the deceased,—or, one just person (or a number of uncertain character) bearing testimony that “the people of such a place have slain this person.”—If, therefore, there be neither any tokens of murder, nor any apparent circumstances testifying to it, the opinion of *Málik* accords with that of our doctors,—with this difference only, that where the inhabitants of the place do not amount to fifty in number, according to *Málik* the oaths are not repeatedly administered so as to make them amount to fifty, but those given are rejected;—whereas, according to our doctors, it is lawful to repeat the oaths until the whole fifty be complete;—and again, according to *Málik*, if the people of the place make oath, as required, they are not subject to a fine,—whereas, according to our doctors, they are subject. One argument adduced by *Shaféi*, in support of his opinion, that “if there be any stain upon the place, the oaths must first be administered to the heir of the slain,” is a tradition of the prophet;—for it is related, that upon the body of a murdered *Mussulman* being found in the well of *Kheebir*\*, and [the relations of the deceased] carrying the matter before the prophet, he directed that fifty of the people of the well should be sworn, and the plaintiffs objecting to this because of those being infidels, he said “Fifty of ye must swear that those people have murdered him,”—to which they replied, “How shall we swear to that which is unknown to us?”—Another argument is, that an oath is required, first, from the person in whose behalf apparent circumstances bear testi-

\* *Kheebir* (also pronounced *Khàibār*) is a city of *Arabia*, situated in the province of *NAJD*, about two hundred and fifty miles north-east of *Medina*, inhabited (as appears from the context) chiefly by *Jews*. It is probable that *Kalebal Kheebir* (the well of *Kheebir*) is the proper name of some place in the neighbourhood.

mony,

mony, (whence it is that the oath is first tendered to the possessor\*;) and therefore, where apparent circumstances testify for the plaintiffs, they are first sworn. According to *Shafëi*, moreover, it is lawful to administer an oath to the plaintiff, as holds in cases where the defendant refuses to swear. As, however, the testimony of *apparent circumstances* merely is attended with some degree of doubt, and retaliation is remitted by the existence of a doubt, but not property, a fine is therefore due from the defendants. The argument of our doctors is, that the prophet has said, “*It is the part of the plaintiff to produce evidence, and of the defendant to swear.*” It is, moreover, related by *Ibn Moosëyib*, that a dead body having been found among the *Jews*, the prophet began by swearing them, and then decreed them to pay the fine,—which affords an argument that the oath is incumbent on the person liable to the fine. With respect to the tradition quoted by *Shafëi*, concerning the people of the well of *Kheebir*, the saying of the prophet, in that instance, is explained in an *interrogatory* sense, as if he had said to the plaintiffs “*Will fifty of you swear?*”—This tradition is also related with some variation; for several authorities state it that the prophet first asked the plaintiffs “*if they could produce evidence?*”—to which they replied, “*if there had been any witnesses the murder would not have happened;*”—when the prophet said to them, “*Let the Jews swear to this effect,—that they did not murder the man, nor do they know the murderer;*”—and therefore the one account runs counter to the other. In reply, moreover, to what *Mälik* has advanced, it is observed that swearing is proof sufficient to *repel* but not to *establish* a claim,—inasmuch that a person does not, by mere swearing, obtain a title even to *property*, although that be (comparatively) insignificant, and consequently cannot obtain a title to life [by retaliation] *a fortiori*. It is to be observed that the heirs have it in their option to appoint any

\* Alluding to disputes concerning property.



fifty individuals\*, because the oath required is their right, and it is most likely that they will fix upon such as are suspected of the murder, or upon persons of known probity among the inhabitants, (those being the most cautious of swearing falsely,) by which means the murderer may be discovered; for the advantage proposed in swearing is the discovery occasioned by a *refusal* to swear; and therefore the upright among the inhabitants, admitting that they themselves were not concerned in the murder, still will not fail to discover the murderer if they know him. If, also, the heirs fix upon a *blind* person among the inhabitants, or persons who have suffered punishment for slander, to swear, it is approved, because the depositions of such are inadmissible only where they appear as *witnesses*; but here they are brought forward merely to *swear*, not as *witnesses*.

and the fine  
of blood is  
then imposed  
on them.

UPON the people of the district swearing, as above, a decree is passed awarding them to pay the fine for the slain; and an oath is administered to the heirs. *Shafei* maintains that the fine is not imposed in this instance; because of a determination of the prophet, who exempted certain *Jews* from a fine upon their taking the oath; and also, because the oath has been ordained by the LAW for the purpose of exculpating the defendant, and not with a view to subject him to any punishment. The argument of our doctors is, that the prophet used to impose the fine as well as the oath, as appears from the traditions of *Abdoola Ibn Sabeel*, with which *Shafei* was not acquainted.—*Omar* also did the same. *Kiffamit*, moreover, was not instituted for the purpose of establishing a fine where the parties refuse to swear, but for the purpose merely of discovering whether it be not a case of retaliation, by compelling the murderer to an acknowledgment, from his fear of taking a false oath. Upon the people of the district, therefore, taking the oath, retaliation being put out of the question, the fine is

\* Of the district, for the purpose of being sworn.

consequently

consequently due from them, either because of their having been guilty of a neglect, (as in cases of homicide by misadventure,) or, because it is evident that they must have slain the person, his body being found among them;—not because of their *refusing to swear*.

IF, among the people of the place selected to swear, any one refuse to take the oaths, he is to be imprisoned until he take it\*; because the oath, in *Kissâmit*, is essential and indispensable, blood being a matter of weight, and not of slight consideration. It is otherwise where a person refuses to swear in a matter of *property*; for the oath, in matters of property, is a substitute in lieu of the article claimed by the plaintiff†, and accordingly, the swearing is remitted by the surrender of the article claimed; but in the case of *Kissâmit* the swearing is not remitted by a payment of the fine. It is to be observed that what is here advanced applies, not only to where the heir of the slain lays his claim against the *whole* of the inhabitants of the district, but also, to where he advances it against any number of them not specifically named; for as those cannot be distinguished from the rest, the case is therefore as if the claim comprehended the whole. A claim laid on the ground of wilful murder is also the same as on homicide by misadventure. With respect to a case of claim advanced against specific individuals, it shall (God willing) be treated of in its proper place.

If any one of them refuse to swear, he must be imprisoned.

IF the inhabitants of the place or district do not amount to fifty in number, the oath must be administered to them repeatedly, so as to make up the complete number of fifty depositions;—because it is recorded of *Omar* that (on a certain occasion) when he ordered a *Kissâ-*

If the whole number of them be not fifty, the oath must be administered

\* That is, “until he either take it, or acknowledge himself guilty of the murder.”

† This is a law phrase.—The meaning of it is that, if the claimant cannot produce evidence, the oath of the defendant must be considered as all that can be expected of him, and acquits him of every demand.

repeatedly,  
until that  
number of  
depositions  
be obtained.

*mit*, forty-nine men only having taken the oath, he administered it to one of them a second time, so as to complete the number of fifty, and then decreed the fine;—and also, because, fifty depositions being requisite upon the authority of the tradition concerning the prophet's determination in this point, the completion of the number, in the utmost possible degree, is therefore requisite;—and it is, moreover, attended with this advantage, that it ascertains the weight and importance of blood. It is to be observed, however, that if there be fifty inhabitants of the place or district, the heir cannot insist upon any of them being repeatedly sworn; because the repetition of the oath is admitted purely from necessity, which does not here exist.

It is not re-  
quired of an  
infant or idiot:

THE oath [required in *Kissāmit*] is not incumbent on an infant or an idiot; for an oath is in the nature of a *declaration*, not of an *act*; and the declarations of such are not regarded. In the same manner, it is not incumbent on a woman or a slave; because those cannot be considered as aiders and confederates of the murderer; and of such alone is it required.

nor, where a  
corpse is  
found with-  
out marks of  
violence upon  
it.

IF a corpse be found without marks of violence upon it, the oath is not required, nor is any fine imposed on the district; for it is here evident that the person was not murdered; because this description is applicable only to one who dies in consequence of some act of violence sustained from another; but the person in question appears to have died naturally, and not in consequence of any violence. Fine, moreover, is incurred by the overt act of the individual; and the oath is imposed from a suspicion of murder; and hence it is indispensable that there be some marks upon the body sufficient to evince a murder,—such as a wound, a bruise, or signs of strangling,—or a hemorrhage from the eyes or ears, as that cannot be occasioned but by some violence. It is otherwise where the hemorrhage proceeds from the mouth, the anus, or the yard; as this may appear without any act of violence.

It

IF either the whole body of the slain be found, or the greater part of it; or the upper half of it, with or without the head, the oath is administered to the people of the district, and the fine is imposed on them. If, on the contrary, the *lower* half only, of the body, be found, or any part of the trunk short of the half, with or without the head, or the hand, foot, or head alone, nothing whatever is imposed on them. The reason of this is, that the law here treated of is founded on the word of God, which expressly mentions the term "BODY." Now the greater part [of the body] is made subject to the rule of the whole, out of reverence to MAN; and accordingly, any principal portion of it is accounted the same as the whole in effect; but it is not so with any inconsiderable portion, as that is neither the whole body, nor can it be virtually accounted such; whence, in such a case, the oath is not required. Besides, if any inconsiderable portion of the body were accounted subject to the same rule with the whole, so as to require swearing and a fine, it might, in some instances, induce the consequence of two swearings and two fines on account of one body, which would be unlawful. In short, it is a rule, where any part of a human body is found, that if the remainder, supposing it afterwards to be discovered, be such as would require swearing and a fine, those are not required on account of such part; and *vice versa*; for the reasons already assigned.

Rules to be observed where only a part of a body is found.

IF a new-born infant be found in any place, and there be no marks of violence upon it, the people of the place are not liable to any thing\*; for as, if the body of an adult be found without marks of violence nothing is required, so likewise in the case of the infant *a fortiori*. If, on the contrary, there be marks of violence upon the infant's body, and it appear to have been completely formed, the oath is administered and the fine imposed upon the people of the place; because it is most probable, where the infant is completely formed, that

The body of an infant being found does not subject the district to any thing, unless there be marks of violence upon it.

\* That is, they are not liable either to have the oath imposed or a fine levied upon them.

it was born alive. But if it be not completely formed, nothing whatever is required, notwithstanding it have marks of violence; because it is most probable that such an infant could not have been born alive.

A person being found slain upon an animal, the oath is administered to the driver, and his *Akilar* pay the fine;

If a person be found slain, upon a quadruped, which another person is driving, the oath is administered to the driver, and his *Akilar* are responsible for the fine; because in this the people of the place have no concern; for as the body is found in the hands of the driver, the case is therefore the same as if it were found in his house. The same rule also holds where the person in question sits upon the animal [holding the body] and another leads it. If, also there be *three* persons engaged about the animal, one riding, another leading, and a third driving it, they are all sworn, and the fine is imposed on their *Akilar*; for as the body is found in their hands, the case is therefore the same as if it were found in their joint house, or tenement,—in which instance they would be required to swear, and their *Akilar* would be accountable for the fine.

or, if there be no driver, the oath is administered and the fine levied upon the nearest inhabited place.

If a person be found slain, upon an animal, moving along between two villages, the oath is administered and the fine imposed upon the inhabitants of the nearest of those villages; because it is recorded that, in the time of the *PROPHET*, a person having been found slain between two villages, the *PROPHET* directed the distances to be measured, and imposed the oath and fine upon the inhabitants of the nearest; and he also, on a particular occasion, wrote to *Omar* to the same effect. It is to be observed, however, that if both the villages be so near the spot as to admit of a man's voice being heard from it, they are both equally liable to the oath and fine; because, where such is the case, it was in the power of the people of both to have come to the deceased's assistance, which they neglected to do.

A dead body being found in a house,

If a person be found slain in any man's dwelling-house, the oath is imposed on the master of the house, as it is in his possession;—and the

the fine is imposed on his *Akilas*, as they are his aiders and coadjutors\*.

the master is sworn, and his *Akilas* pay the fine.

If a person be found slain in any place, the people of which are of two different descriptions, some of them being the proprietors, and others merely residents upon rent or loan, the oath is administered to the former, not to the latter, according to *Haneefa* and *Mohammed*. *Abou Yoosaf* says that it is administered to all indiscriminately, as all are alike responsible; for do we not see that the prophet directed the oath to be administered to the *Jews*, who were merely *residents* at *Kheebir*?—To this, however, *Haneefa* and *Mohammed* reply that the preservation of the peace, in any place, rests more immediately upon the proprietors, not upon those who are merely tenants, because the residence of the former is continual, and not liable to interruption; and hence they in particular are responsible, as the neglect is attributed to them. With respect to the *Jews* at *Kheebir*, they were, in reality, *proprietors* of the place, as the prophet restored them to their possessions there, and imposed a tribute upon their lands.

The proprietors of a place are sworn in such cases, not the renters.

If there be two descriptions of residents in a place, some being *original* proprietors, and others *recent* proprietors, and a person be found slain there, the oath is administered to the whole indiscriminately, but the fine is imposed solely on the *original* proprietors, although this should be only a single person. *Abou Yoosaf* says that the fine, as well as the oath, is imposed on the whole; for it is imposed solely on account of a neglect in the preservation of the peace; and all are alike to blame in this particular, as the power to preserve the

*Recent residents* are sworn, but the fine is levied on the *original residents* only.

\* The statement of this case, by which the *Akilas* are exempted from taking the oath, proceeds upon the supposition of their not being on the spot at the time;—for if they be present the oath is also administered to them,—as will appear a little farther on. The same rule applies to the driver of an animal, upon which a dead body is found, as before stated.

peace depends upon the property people have in the place; with respect to which all the proprietors are on an equal footing. The arguments of *Haneefa* and *Mohammed* on this point are twofold.—FIRST, the original proprietors are the more immediate guardians of the place, as is universally admitted.—SECONDLY, the original proprietors are the old established residents, whereas the more recent proprietors are merely new comers, and the power of regulation and of preserving the peace therefore particularly belong to the former.—(Some say that this doctrine of *Haneefa* is founded on what he saw of the people of *Koofa*; for there the *original* proprietors had the guard of places, not the *recent* proprietors.)

If there be none of the original proprietors concerned in the place, having entirely parted with it by sale or otherwise, the oath and fine are imposed on the purchasers, or other present possessors, according to all authorities.

Cases of a  
person being  
found slain in  
a house.

If a person be found slain in any man's house, the oath is administered, not only to the master of the house, but also to his *Akilas*. Those, however, are included in the swearing on the condition only of their being *present*; for if they be absent, the oath is administered to the master fifty times repeatedly, so as to complete the number of fifty depositions. This is according to *Haneefa* and *Mohammed*.—*Abou Yoozaf* says that the *Akilas* are not required to swear. The argument of *Haneefa* and *Mohammed* is that, where the *Akilas* are upon the spot, the regulation of the place is as much an obligation upon them as upon the immediate proprietor; and consequently they are associated with him in taking the oath.

If a person be found slain in a house held unequally in partnership among three, one half of it (for instance) appertaining to *Zeyd*, a tenth of it to *Amroo*, and the remainder to *Bikker*, yet the oath is administered:

administered according to the number of the persons, not according to the amount or value of their respective shares;—because the possessor of the smallest share is at liberty to obstruct him who possesses a larger share; and such being the case, all are upon an equal footing with respect to the regulation of the house and the preservation of the peace within it, and are consequently alike involved in the charge of remissness.

IF a man purchase a house, and, before he takes possession of it, a person be found slain in it, the fine is imposed on the *Akilas* of the feller, whether a reserve of option have been stipulated to either party in the sale or not;—whereas, if the purchaser first take possession of the house, and the man be then found slain in it, the fine is imposed on the purchaser. The two disciples maintain that if there be no option in the sale, the fine is imposed on the purchaser\*: but if there be a condition of option, it is imposed on the *Akilas* of that party to whom the house in the end belongs†; for as the fine is imposed solely on account of the neglect of circumspection, it therefore falls only on him who possessed the power to exert such circumspection; and as this power belongs only to the proprietor, on him alone is the fine incumbent;—whence it is that, where a person is found slain in a *deposited* house, the fine falls upon the *owner*, not on the *trustee*. Where, moreover, there is an option in sale, the purchaser becomes the proprietor, and the fine is consequently due from him: but where, on the contrary, there is a condition of option, the ascertainment of the property becomes necessary; in other words, in whomsoever the property of the house is ultimately established, upon him the fine falls. The argument of *Haneefa* is, that the ability of exerting circumspec-

A person being found slain in a sold house, the fine is imposed on the *Akilas* of the feller.

\* Whether he have taken possession of the house or not.

† To understand the reasoning upon this case, the reader must refer to *conditions of option in SALE*. (See Vol. II. p. 380.)

tion.



tion is in consequence of actual possession, not of mere right of property; for the person in immediate possession is enabled to take a proper care, although he be not the proprietor,—whereas the proprietor, if he be not in possession, has not this in his power. Now where a person sells his house, so long as the purchaser does not take possession, the seller still continues seized of it, whether there be a condition of option in the sale, or not; and hence, in this case, the fine falls upon the *Akilas* of the seller. If, on the contrary, the purchaser have taken possession\*, and there be no reserve of option to either party, the fine evidently falls upon him. If a right of option be also stipulated to the *seller*, the house is insured in the hands of the purchaser, to the amount of its value; (in other words, if it be destroyed in his hands, he is accountable to the seller for the value;) in the same manner as holds in a case of usurpation; whence regard is paid to his possession, and he is accordingly enabled to use circumspection;—or if, on the other hand, a right of option be reserved to the *purchaser*, he is in that case exclusively entitled to act with respect to the house; (in other words, he may do as he pleases with it, but no other person;)—from all which it follows that the fine falls upon the purchaser, where he has taken possession of the house.

If the real owner of the house be unknown, it is imposed on the *Akilas* of the possessor.

If a man be found slain in a house in the possession of any person, the real proprietor being unknown, the fine is not imposed on the *Akilas* of the possessor until evidence be adduced to prove his being the proprietor, in case his *Akilas* should dispute, and deny his being so, alleging that the house is merely a deposit in his hands;—because the possessor's having a *property* in the house is an essential condition to his *Akilas* being liable to the fine; and although possession be an argument of property, yet still it is possible that this person may not be the proprietor. The bare circumstance of *possession*, therefore, does

\* Previous to the body being found in the house.

not

not suffice to subject to the fine, in the same manner as it does not suffice to establish a right of *Shaffa*.

If a person be found slain in a ship or boat, the oath and fine are imposed upon the sailors, boatmen, or other persons who may be on board, or are employed in tracking it up the side of a river, whether they be the proprietors, or otherwise, because the vessel is in their hands;—and the same rule also obtains with respect to carts, or other carriages. This perfectly accords with the doctrine of *Abou Yoosaf*, as he holds that the oath is imposed on the residents, whether they be proprietors or not. *Haneefa* and *Mohammed*, on the contrary, hold that it is imposed on the *proprietors* only, not on those who are merely *residents*:—but the difference they make between a house or place and a vessel or carriage is, that the latter are moveable from place to place, and therefore, with respect to them, regard is paid to *possession*, not to *property*, in the same manner as in the case of animals;—whereas a house, or place, is not moveable, and therefore, with respect to them, regard is paid to *property*, not to *possession*.

A person being found slain in a carriage of any kind, the oath and fine are imposed on those in whose hands it is at the time.

If a person be found slain in the mosque of a division [of a city,] the oath and fine are imposed on the inhabitants of that division; because the care and regulation of the mosque rest particularly upon them. If, on the contrary, a person be found slain in the *Jàma* mosque, or in the highway, or on a bridge, the oath is not administered to any one; but the fine is paid from the public treasury; because the *Jàma* mosque, the highway, and bridges are for the use of the community at large, and as the property of the public treasury also belongs to them, the fine is therefore payable from it.

A person being found slain in a mosque, the oath and fine are imposed upon the inhabitants of that division.

If

Case of a  
person being  
found slain  
in a public  
market,

If a person be found slain in a *Bazâr*\*, which is the property of any one, the oath and fine, according to *Abou Yoosaf*, are imposed on the inhabitants of such *Bazâr*;—whereas, according to *Haneefa*, they are imposed on the proprietor. If, on the contrary, a person be found slain in a *Bazâr* not belonging to any one in particular, (as where it is situated in common land,) the fine is disbursed from the public treasury, as the *Bazâr* in question belongs to the community at large.

or a prison.

If a person be found slain in a prison†, the fine for him, according to *Haneefa* and *Mohammed*, is disbursed from the public treasury. *Abou Yoosaf* maintains that the oath and fine are imposed on the prisoners, because they are the inhabitants of the place, and it is evident that they slew the person. The arguments of *Haneefa* and *Mohammed* are twofold.—FIRST, the people of the place in question are in a state of subjection, and therefore cannot be considered as the *coadjutors* of each other; whence they are not liable to any thing incurred under the idea of *aid* and *assistance*.—SECONDLY, the prison has been constructed with a view to the advantage of the *Mussulman* community; and consequently, where this view is answered, the mulcts incurred in it must be disbursed from the public purse.

No inquest is  
instituted  
upon a person

If a person be found slain in a desert, at a distance from any inhabited place, (that is, so far removed as that a man's voice cannot be

\* This is a well known term for a street or range of shops, which are occasionally built by the proprietors of lands, and let to the merchants: it is also a term applied to any piece of land hired out, or set apart, for the purpose of a market.

† Arab. *Sawk-al-Mamlouk*; Pers. *Bandee-Khàna*; literally, "the house (or place) of slaves." The term has a reference to local customs, and signifies (perhaps) a square, court, or division of a city, set apart for the reception and accommodation of prisoners taken in war. The translator has not been able to obtain any satisfactory explanation of it.

heard

heard from it,) his blood is of no account ; because, the place being at such a distance, no neglect is imputable. This proceeds on a supposition of the desert not being the property of any individual ; for if it belong to any person in particular, the oath and fine are imposed upon him and his tribe or family.—(If the desert be situated between two inhabited places, the oath and fine are imposed on the inhabitants of that which is nearest to the spot, for the reasons already assigned.)

found slain in  
a desert place;

If a person be found slain on a great river, such as, the *Euphrates*, floating down with the stream, his blood is of no account, such rivers not being in the hands of, nor particularly belonging to, any person. If, on the contrary, a person be found slain on the *shore* of a great river, and not carried down with the stream, the oath and fine are imposed upon any village, on that side, within such a distance as admits of a man's voice being heard from the spot ;—and if there be two or more villages within that distance, they are imposed upon the nearest.

or floating  
down a river,

If a person be found slain in a small river, (that is, such as the right of *Shaffa* extends over,) the oath and fine are imposed upon the people who claim a right in such river, as it is accounted to be *in their possession*. (It is related, in some law books, that the oath is imposed on the people, and the fine upon their *Akilas*.)

unless such  
river be pri-  
vate property.

If the heirs of the slain impeach any one of the people of the place in particular, still the oath is not remitted with respect to the others, on a favourable construction of the LAW ; whereas, if the plaint be laid against any individual *not* one of the people of the place, those are not required to swear. The difference between these two cases is that where any one of the people of a place is accused in particular, all the rest are in some degree implicated in the accusation, because of their want of caution in not preventing the bloodshed ; whereas, if a *stranger* be accused, they have no concern in it. Besides, the people

The heirs ac-  
cusing any  
person not an  
inhabitant of  
the place,  
those are not  
required to  
swear.

of the place are liable to the fine, in consequence of the body being found among them, on this condition, that the heirs bring their suit against *them*; but where they accuse a stranger, this precludes any accusation against them, whence such accusation is not afterwards attended to, nor are they liable either to the oath or the fine, because of the requisite condition not existing in this instance.

The oath and fine are imposed on the inhabitants of a district in which a person is found slain after a riot, unless the heirs accuse some person or persons in particular.

If a body of people assemble in a place with arms, and afterwards disperse, and a person be found slain in that place, the oath and fine are imposed on the inhabitants of the division, as the slain is found amongst them, and the regulation and guard of the place rests upon them. If, however, the heirs of the deceased accuse the body of people who had assembled, as above, or any one of them in particular, the oath and fine are not imposed on the inhabitants; because the accusation, being thus laid, exempts them from any concern in the matter, and consequently, from any obligation to take the oath. It is to be observed, however, that where the heirs lay their accusation against the body assembled, or any individual of them, those are not liable to any thing until the heirs produce evidence in proof of their assertion; because a matter of *right* cannot be established on the simple claim of the plaintiff.

Case of a person being found slain in a camp.

If a person be discovered slain in a camp, pitched on a plain which does not belong to any one in particular, and the body be found in a tent, the oath and fine are imposed on the owners of the tent,—or, if *not* in a tent, they are imposed on the owners of the tent nearest to the spot.—If, on the contrary, the plain in which the camp is pitched be the property of any one, the oath and fine are imposed on him.

There is no inquest upon a body found after a fight.

If a body of *Mussulmans* and of infidels assemble with arms for the purpose of fighting, and a person be afterwards found slain among them, his blood is of no account, nor is the oath or fine imposed on

any, because it is evident that the deceased was slain by an open enemy. If, on the contrary, they assemble with any other view, and not for the purpose of fighting, the same rules obtain as are set forth in the preceding example; that is, if the body be found in a tent, the oath and fine are imposed on the owners of the tent, or, if *not* in a tent, they are imposed on the owners of the tent nearest to the spot, provided the camp was pitched on ground not belonging to any person;—but if otherwise, the owner of the ground is responsible.

If a person, on being required to take the oath, should declare that “the deceased was murdered by *such a person*,” he must be sworn to this effect,—“By God I did not kill the deceased, nor do I know his murderer, *except such an one*;”—because it is to be apprehended that by his allegation, “*such an one* committed the murder,” he may mean to screen himself from prosecution; and therefore such allegation is not to be credited; but he is sworn, as aforesaid; in order to guard against the possibility of a mental reservation in his oath.

Form of the oath, in accusing an individual.

If two inhabitants of a place\* bear evidence against a person not belonging to that place that “he murdered the deceased,” still their testimony is not credited, according to *Haneefa*. The two disciples maintain that it must be credited; for although they stand within the possibility of becoming litigants themselves in the matter †, yet upon the heirs laying their accusation in another quarter, they are no longer in this predicament. Their testimony is therefore credited; in the same manner as holds in the case of an agent for litigation, dismissed from his employment before he has proceeded in his suit,—whose evidence is credited notwithstanding he had stood in a predicament to be

The evidence of the inhabitants of the place is not admitted, either against a stranger.

\* In which a person is found slain.

† In case of the heirs laying their accusation against that place.

a litigant. The argument of *Haneefa* is that the people of the place in question stand as litigants, they being accounted the murderers\*, because of their remissness in preserving the peace; whence their testimony is not to be admitted although they should be at the time freed from litigation;—in the same manner as where an executor accepts of his appointment, and, after being discharged from his trust, offers to give evidence,—in which case his testimony is not admitted. Our author remarks that the judgment on a great variety of cases is determined by what is here stated.

or another  
inhabitant.

If the heirs of the slain lay their accusation against any individual of a place, and two inhabitants of the place offer to bear testimony in support of such accusation, it is not admitted; because here they are themselves immediately under prosecution, (as has been already observed,) and are desirous to free themselves from it, whence their evidence is liable to suspicion. It is recorded from *Abao Yoosaf* that in this case those two are to swear† to this effect, “by God I did not kill him,” without adding more; because [in offering to bear testimony as above,] they have already declared that they know the murderer.

A person dy-  
ing of a  
wound re-  
ceived in any  
place, the  
people of that  
place are ac-  
countable.

If a man be wounded among any tribe, or in any place, and it be not known who struck him, and he be carried to his own house, or to any situation out of that place, and there die of his wound; in this case, (provided he have continued bedridden until the time of his death,) the oath and fine are imposed on the people of the said place or tribe, according to *Haneefa*. *Abao Yoosaf* maintains, that neither the oath nor the fine are imposed in this instance; because the injury received in the place, or among the tribe, was not *murder*, but something less;

\* Of the person found slain in their place or division.

† Upon being called on (in common with the other people of the place) to take the oath of *Kiffāmit*.

and

and as the oath and fine are not imposed in any instance short of murder, it follows that they are not required in this instance, any more than where the deceased had not continued bedridden from the time of receiving the wound. The argument of *Haneefa* is, that upon the wounded person dying of the wound, it [the wound] becomes murder;—whence it is that retaliation is incurred where a person wilfully wounded dies of his wound, and the wounder is known.—If, moreover, the wounded person remain continually bedridden until death, his decease is attributed to the wound: but if he should have been able to rise from his bed, it is possible that he may have died of something else than the wound; and consequently the oath and fine are not imposed, because of the doubt thus engendered.

If a man find a person wounded, but still having a little life in him, and carry him on his back to his own house, and the wounded person die there after a day or two, or whilst he is carrying him thither, he is not responsible in the opinion of *Aboo Yoofoof*; although, in analogy with the opinion of *Haneefa*, he would be responsible, as the deceased is thus found in his hands. The arguments on both sides have been already recited.

Case of a person found wounded, and dying in the hands of the finder.

If a man be found slain in his own house, the fine for him is imposed on his *Akilas*, in behalf of his heirs, according to *Haneefa*.—*Aboo Yoofoof*, *Mohammed*, and *Ziffer*, maintain that nothing whatever is due in this instance; for as the house was in the possession of the deceased at the time that he sustained the injury which occasioned his death, he is therefore considered as having slain himself,—whence his blood is of no account. The argument of *Haneefa* is, that *Kissâmir* is imposed only on account of a person being found slain, not on account of a person being wounded; (whence it is that if one of the *Akilas* should die between the time of the person being wounded, and of his decease, his estate is not liable for any part of the fine;) and, at the

A person being found slain in his own house, the fine is imposed on his *Akilas*.



the time of the person in question being found slain, the house, which had belonged to him, is become the property of his heirs, and is (in fact) in their possession; whence his *Akilas* are accountable for the fine, as aforesaid. It is otherwise in the case of a *Mokâtib*; for if a *Mokâtib* be found slain in his own house, the house still remaining (virtually) in his possession after his decease, he is therefore accounted to have slain himself, and consequently, his blood is of no account.

One of two residents in a house being found slain therein, the fine is imposed on the other.

If two men reside in one house, and one of them be found slain therein, *Aboo Yoosaf* is of opinion that the fine for him is imposed on the other. *Mohammed*, on the contrary, maintains that the other is not subject to any thing; for it is as possible that the deceased slew himself as that he was slain by the other; and therefore the fine cannot be imposed because of the doubt. To this *Aboo Yoosaf* replies, that as it is not probable a man should commit violence upon himself, the bare apprehension of such a thing is therefore of no weight in this instance, any more than where a person is found slain in the highway, or elsewhere.

Case of a person being found slain in a place belonging to a woman;

If a person be found slain in a village belonging to a woman, the oath, according to *Haneefa* and *Mohammed*, is administered to the woman fifty times repeatedly, and the fine is imposed upon her *Akilas*, (that is, her nearest paternal relations.)—*Aboo Yoosaf* maintains that the oath also is imposed upon her *Akilas*; because it is not incumbent on any to swear, excepting such as are *coadjutors*; and as a woman is not of that description, she therefore stands in the same predicament with an infant, and consequently, like an infant, cannot be required to swear. The argument of *Haneefa* and *Mohammed* is, that the oath is imposed with a view to repel the suspicion of murder; and as such suspicion exists with respect to the woman in question, it is therefore incumbent on her to swear. Our modern lawyers remark

mark that women are not associated with their *Akilas*, in paying the fine, in any except this one instance.

If a person be found slain in lands belonging to any one, and situated near a village, and the proprietor be not an inhabitant of the village, he is responsible, as the regulation and guard of those lands rest upon him.

or in lands situated near a village.

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*HEDAYA.*

# H E D A R A.

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## B O O K L I.

### Of MAWÀKIL, or the LEVYING of FINES.

Definition of terms. **M**AWÀKIL is the plural of *Makolá*, signifying a *Deyit*, or *fine of blood*; and *Akilas* are those who pay the fine, which is termed *Akkil* and *Mawàkil*, because it restrains men from shedding blood,—*Akkil* (among a variety of other senses) meaning *restraint*.

The fine incurred by fineable bloodshed is THE fine for *manslaughter*, homicide by *misadventure*, or by an *intermediate cause*, and (in short) for every species of bloodshed by which fine is incurred, is due from the *Akilas* of the slayer, as has been

been before explained ;—because it is recorded that *Hamī Ibn Mālik* had two wives, one of whom slew the other ; and the prophet ordered the *Akilas* of the woman who killed the other to pay a fine to the heirs of the slain ;—and also, because the life of man is sacred, and therefore not to be taken without penalty \*. A person, moreover, who slays another by misadventure is excusable ; (and so likewise, a person who commits *manslaughter*, in consideration of the instrument ;) and therefore is not liable to *punishment*, but is rather entitled to an *alleviation* ;—and as, if the whole fine were levied on *him*, it might prove utterly ruinous, (which would amount to *punishment*,) his *Akilas* are therefore associated with him in the payment of it, in order that punishment may be avoided, and the penalty alleviated to him. The reason for involving the *Akilas* in particular is, that the *slayer* is accounted to have committed his offence by means of the strength of his aiders and associates ; and, as those are his *Akilas*, *they* therefore, as it were, are guilty of the offence in remitting their vigilance ;—and, having been thus deficient in their duty, they alone are associated in the fine, and not others.

due from the  
*Akilas* of the  
slayer.

THE *Akilas* of a man are all those who are enrolled with him, provided he be an enrolled person ; and the fine is paid [deducted] from the pay or subsistence they receive from the *Imām* in the course of three years. (By the *enrolled* is to be understood the *army*, whose names are entered upon the *Divān*, or public records.) *Shafēi* maintains that the fine falls upon the relations of the slayer ; for such was the rule in the time of the prophet, whose institutes cannot lawfully be broken after having been once established ; and, if the fine were levied upon any others than the relations and tribe of the slayer, it would induce a deviation from the institute of the prophet in this particular. The argument of our doctors is a tradition of *Omar*, who,

The *Akilas* of  
a registered  
person are  
those who are  
enrolled with  
him ;—and  
the fine is  
taken out of  
their pay, in  
three years ;

\* Arab.—“ and therefore must not go for nothing.”

upon his forming a register, ordained that those who were registered should be liable for the fines of all who were enrolled with them,—and this in the presence of the companions, none of whom opposed it; whence it may be inferred that they were unanimous in their opinion upon this subject. With respect, moreover, to what *Shaf'ii* alleges, that, “if the fine were levied upon any others than the relations and “tribe of the slayer, it would induce a deviation from the institutes “of the prophet in this particular,”—it may be replied that this is not a *deviation*, but rather a *confirmation* of an ordinance prevailing in the time of the prophet; for at that time the fine was levied upon the *aiders* and *associates* of the party; and in those days *aid* and *association* originated from a variety of causes, such as relationship, clientage, and so forth; but in the time of *Omar* association became regarded according to register; (in other words, those who were enrolled together stood as the assistants of each other;) and hence it was that he appointed the fine to be paid by them,—nor did he reverse any ordinance of the prophet in so doing. The regulation of paying the fine within three years is for this reason, that such was the ordinance of the prophet and (after him) of *Omar*; and also, because the troops receive their pay annually, whence if the whole fine were levied at once it would be distressful, rather than alleviating.

or altogether,  
if, at the end  
of three  
years, they  
get their  
whole arrear  
at once.

If, after the *Kázee* decreeing a fine, the Sultan disburse no pay to the enrolled for three years, and then give them three years pay at once, the whole fine is at once deducted, provided the pay be on account of the years subsequent to the *Kázee's* decree of fine; because that is due in virtue of his decree, (as shall be hereafter explained;) and it is exacted in three years solely because the pay is disbursed only once a year; and where the pay for three years subsequent to the *Kázee's* decree is issued at once, the whole fine is at once exacted, since the design was, that it should be apportioned to the pay of three years respectively, which design is here accomplished. If, on the contrary,

(after

(after the *Kāzee* decreeing the fine,) the Sultan pay the arrears of *antecedent* years, nothing is to be deducted therefrom, as the fine is due only in virtue of the *Kāzee*'s decree.

WHERE a complete fine is incurred\*, one third of it is due in the *first* year, one third in the *second* year, and the remaining third in the *third* year. Where, on the other hand, a third only of the fine is incurred†, or less‡, it is due within the year; and any thing beyond that to the amount of two thirds§ is due in the *second* year; and whatever is incurred from two thirds to any thing short of the complete fine|| is due in the third year.

Regulation with respect to the times of payment.

ANY fine due from the *Akilas*, being the *tribe* or *family* of the slayer, or from the estate of the slayer (as where a father wilfully murders his son) is payable from the property of the *Akilas*, or of the slayer in three years. *Shafei* maintains that a fine due immediately from the slayer is payable upon the instant; for, as the delay of three years is designed for an alleviation to the *Akilas*, it cannot therefore apply to a *wilful* case. The argument of our doctors is that the imposition of a fine in compensation for life is contrary to analogy, since between life and property there is no proportion:—but yet as the LAW, in fixing the delay, has declared itself upon this subject, it cannot be departed from;—and therefore the payment is *deferred*, and not *immediate*.

Three years are also allowed for the payment, where the *Akilas* are composed of the offender's kindred.

IF ten persons slay one person by misadventure, one tenth of the fine is due from the *Akilas* of each, respectively, payable in three years; for each tenth is a portion of the whole fine; and, as the *whole*

Where a number of persons are concerned in

\* As in the case of homicide by misadventure.

† As in the case of a single cut.

‡ As in cutting a finger.

§ As in the case of two cuts.

|| As in the case of three cuts.

accidental  
homicide, a  
proportionate  
part of the  
fine is levied  
from the *Aki-  
las* of each.

is deferred, it follows that each portion is so likewise. It is to be observed that the three years are counted only from the time of the *Kázee's* decree; for the fine is imposed as an equivalent, or (as it were) the value of the life which has been taken; and, as *value* is rendered due only by a judicial decree, regard must therefore be paid to the *date* of such decree;—in the same manner as, in the case of a child born to a *Magroor*, regard is paid to the value it bears at the time when the *Kázee* passes his decree concerning it; in other words, if a person purchase a female slave, and she bring forth a child, and the purchaser claim the child, and another person afterwards prove his right to the female slave,—the child is free, and the purchaser must pay the value of it to the rightful owner of the mother;—in which case regard is paid to the value the child bears at the time of the decree; and so likewise in the present instance.

The *Akilas* of  
a person not  
registered are  
his nearest of  
kin.

THE *Akilas* of any person not enrolled or registered are, his *tribe* or *family*, descended from one father; because those are his *assistants*, and in imposing the fine regard is paid to *assistance* and *aid*.—The whole fine is divided among the *Akilas* of the offender, payable within three years; and is not to be levied upon any individual at a rate exceeding four *dirms* at one time. Our author remarks that this is mentioned in the abridgment of *Kadooree*; and that it affords an argument that if the whole fine, in the three years, be made to exceed four *dirms* to each individual, it is lawful, since if four *dirms* be levied *per annum*, the gross amount in three years is twelve *dirms*. *Mohammed*, however, expressly mentions that no more must be levied upon each individual than three or four *dirms* for the three years; and that at the rate of one *dirm* only, or one and a third, each year;—and this is approved.

or (failing of  
them) the

If the family be not equal to the discharge of the fine\*, those

\* There being so few of them that the fine would exceed four *dirms* to each individual.

who

who stand the nearest in point of affinity must be joined with them, according to their degree of relationship;—first the brothers; then their children; then their uncles; and then their children. With respect to the father, grandfather, sons, and grandsons, some say that they are included, whilst others maintain that they are *not* so. The same rule also obtains with respect to *registered* or *enrolled* persons: in other words, if the enrolled *Akilas* be too few, insomuch that the share of each amounts to more than four *dirms*, such registered tribe is associated with them as is nearest to the registered tribe of the slayer in point of *aid*, at the time of the accident taking place; and, if that tribe be also insufficient, the next nearest tribe; and so of the rest. The judgment of which tribe is nearest to the tribe of the slayer is left to the determination of the *Kâzee*. This is according to our doctors. *Shaf'î* maintains that each individual is liable to half a *deenaar*, whether he be rich or poor; he judging of this from *Zakât*. The former is, however, the better opinion.

next nearest,  
according to  
their degrees.

If the *Akilas* be such as receive subsistence\*, the fine is levied upon their subsistence, within three years, at the rate of one third every year; for with respect to them subsistence stands in the place of pay†, both being disbursed from the public treasury. Attention, however, must be paid to the time and manner of the subsistence being paid:—if it occur *annually*, the third of the fine must be taken upon its first occurrence after the *Kâzee*'s decree of fine; if *half yearly*, a sixth must be taken; or, if *monthly*, it must be taken monthly, at such a rate as may amount to a third of the whole in the year. If, on the contrary, the subsistence be *monthly*, and the pay *annual*, the fine must be taken from the *pay*, not from the *subsistence*, as from the former it can be more easily deducted than from the latter, because of its being the more considerable of the two. Public maintenance, it

The fine is levied upon subsistence, in the same manner as upon

\* Arab. *Rizî*.  
a little further on.

† Arab. *Atta*.—The difference between those is explained



is to be observed; is of three sorts or descriptions; subsistence [*Rizk*], gratuity [*Kafāyat*,] and pay [*Atta*;] by the first of which is understood the allowance appointed from the public treasury for the supply of immediate necessities,—by the second, any extraordinary allowance granted on particular occasions,—and by the third, the annual pension or stipend established according to rank and service.

The offender pays his part of the fine at the same rate as his *Akilas*.

THE slayer, in paying the fine, is upon the same footing with his *Akilas*, and must pay his proportion in the same manner as any other individual; for, as it was he who actually shed the blood, it would be unreasonable that he should be exempted, and not the others. *Shafēi* maintains that no part of the fine falls upon the slayer; for, as he is exempted from the *whole* fine, (because of his being excusable, as before observed,) so is he from every part of it. Our doctors, on the other hand, argue that the reason of the *whole* fine not being imposed is, lest it should prove ruinous to the slayer; but the same objection does not hold to the imposition of a *part*. With respect, moreover, to what *Shafēi* urges, that “the slayer is exempted from the fine, “because of his being *excusable*,”—it is not admitted; for, if such were the case, it would follow that his *Akilas*, who were altogether unconcerned in the homicide, are exempt *a fortiori*.

Women and infants are not liable to fine, either as *Akilas*,

or as offenders.

FINE is not imposed on women or infants, who receive subsistence from the state; because such was the rule observed by *Omar*; and also, because fine is imposed only on coadjutors\*, in consequence of their neglect of precaution; and women and children are not coadjutors,—whence it is that they are exempted from capitation tax. In conformity, also, with this rule, if the slayer be a woman, or an infant,

\* Arab. *Ahl Noofrit*; meaning all who are in a state either to *assist* or *restrain* their fellows, or to defend the community, make war, &c. It is a technical term, for which we have no expression in our language perfectly analogous.—In the institutes [Vol. II.] it is used to express all those who, being *fit to bear arms*, are liable to be called forth to service.

no part of the fine is incumbent upon them. It is otherwise with respect to a *man*; for upon him a part of the fine is levied in consideration of his being one of the *Akilas*; because a man comes under the description of a coadjutor, whereas women or infants do not.—This (it may be observed) is at variance with the rule before laid down (in treating of *Kiffāmit*, or the administering of oaths in cases of supposed bloodshed,) where a dead body is found in the house of a woman; for in that instance our modern doctors have included the woman with her *Akilas* in the payment of the fine. That, however, is a particular exception from the general rule, as has been already remarked.

THE inhabitants of a particular city are not liable to pay the fine for the inhabitant of another city, where the citizens of each are registered separately; for fine is imposed in consideration of *aid* either by *enrollment* or by *vicinity*; and neither of those exist in this instance;—not the *former*, because the cities are separately registered; nor the *latter*, because the fellow-citizens of the slayer stand in a nearer relation to him than the inhabitants of any *other* city.

The inhabitants of a place are not liable to the fine for a person of another place, unless the places be in one register.

ALL the inhabitants of a city are liable to the fine for an inhabitant of the suburbs or vicinity; because those are dependants on them, having recourse to them for defence, and for aid in all their undertakings. Hence the inhabitants of a city must contribute to pay the fine of an inhabitant of the suburbs, in consideration of being his neighbours and coadjutors.

The inhabitants of a city are liable for the fine of a resident in the suburbs or vicinity.

IF a person be resident in one city, but enrolled in another, his *Akilas* are those with whom he is enrolled, and they must pay his fines, not his townsmen, the former being his coadjutors, not the latter. In short, aid by register is of a forcible nature,—whereas aid by residence, family, relationship, patronage, or manumission, is of a weak

In imposing the fine upon *Akilas*, regard is paid to *registry*, rather than to *residence*.

a weak nature ; and no attention is paid to the weaker during the existence of the stronger. It is to be observed that, next in order after aid by *register*, regard is had to aid by *family* and *relationship* ; and this is a ground upon which are built a variety of cases.

The inhabitants of a city are liable for a fine incurred by an unregistered resident from the desert ;

If an inhabitant of a city commit a fineable offence, and he have no pay appointed to him in the public register, and the inhabitants of the desert \* be more nearly related to him than those of the city, still his fine must be paid by the enrolled inhabitants of the city. Some have alleged that the enrolled citizens are to pay his fine, although there should exist no relationship whatever between them ; because the enrolled give aid to all the inhabitants of a place indifferently, and do not confine it to those who are in pay. Others, again, say that this relationship is a necessary condition to paying the fine, as appears from the statement of the case, which says, “ and the inhabitants of “ the plain be more nearly related to him than those of the city,”—since from this it is to be inferred, that the inhabitants of the city ~~are~~ related to him, but in a more distant degree. The fine, moreover, in this instance, is imposed in virtue of relationship ; but, as the inhabitants of the city are more immediately connected with the offender by vicinity of residence, and therefore better qualified to afford him aid, the fine is levied on them ;—in the same manner as where an infant has two guardians, one connected with him in a nearer and the other in a more distant degree ; in which case the right of contracting the infant in marriage appertains to the nearest of the two ;—but, if he be absent, the right then devolves to the other who is present, as being best qualified ;—and so here likewise.

but not unless he have

If an inhabitant of the desert come into a city, but have no dwelling-place there, the enrolled citizens are not liable for a fine incurred

\* Arab. *Bādīā*, a general term for all the plains or deserts of *Arabia*.

by

by him, as they are not supposed to *aid* any but *residents*. In the same manner also, and for the same reason, the inhabitants of the desert are not liable for the fine incurred by a citizen who may happen to come among them.

become a resident there.

If a *Zimnee* kill any person, the fine falls upon his *Akilas*, (standing in the same relation to him as *Mussulman Akilas*,) provided he possess known *Akilas*, who are accustomed to pay fines for each other; for *Zimnees* have submitted to all the *Mussulman* ordinances which form the temporal law, but more especially to those of a *restraining* nature, such as punishment for *theft* or *slander*, retaliation, and fine. *Zimnees*, moreover, are the coadjutors of each other; and consequently the *Akilas* of a *Zimnee* are liable to the fine incurred by him. If, on the contrary, he have no known *Akilas*, the fine is payable from his property, within three years from the date of the *Kázee's* decree, (in the same manner as holds with respect to *Mussulmans*;)—because the fine is due from the slayer in the first instance, and cannot devolve upon his *Akilas* unless such are to be found; and where they do not exist, it must remain due from the offender himself;—in the same manner as where one of two *Mussulman* traders slays another in a foreign country; in which case the fine falls upon the slayer, as the residents in the *Mussulman* territory cannot be subjected to it, since from them he could not derive aid.

*Zimnees* are subject (among themselves) to the same rules as *Mussulmans* in this particular.

AN infidel is not liable for the fine incurred by a *Mussulman*, nor a *Mussulman* for the fine incurred by an infidel; because *Mussulmans* and infidels are not considered as the coadjutors of each other. Infidels, therefore, pay the fines incurred by infidels,—and this, notwithstanding any difference of sect.—Lawyers, however, remark that where any *very essential* difference subsists between sects, (such as between *Jews* and *Christians*,) they are not liable for the fines incurred by each other.

*Mussulmans* and infidels are not liable to pay the fine for each other.

If, between the offence and the decree, the offender's *Akila* be changed, the decree must issue against his last *Akila*.

If an inhabitant of *Koofa*, having his pay appointed to him in *Koofa*, kill a person, and he be after that registered and have his pay appointed to him at *Basra*, and the matter be referred to the *Kazee*, he must impose the fine upon the *Akila*s who are of *Basra*.—*Ziffer* maintains that he must impose it upon the *Akila*s who are of *Koofa*; (and such also is the opinion of *Abou Yoofof*;) because as the offence, which is the occasion of the fine, was committed at a time when the people of *Koofa* were the offender's *Akila*s, it is consequently due from them, not from the people of *Basra*; in the same manner as if the registry of the offender in the rolls of *Basra* had taken place subsequent to the *Kazee*'s decree. The argument of our doctors is, that the fine is due only in consequence of the *Kazee*'s decree, and accordingly falls upon those who are the *Akila*s at the time of passing the decree. It is otherwise where the offender becomes registered in *Basra* after passing the decree; for then the fine falls upon those who were the *Akila*s at the time of issuing it, namely, the people of *Koofa*; because, as it was by the decree rendered obligatory upon them, it cannot afterwards devolve upon others, since a fine cannot devolve after being once established. The offender's proportion, however, is taken from his pay at *Basra*; for his share is deducted from his pay, which he then receives at *Basra*.

OBJECTION.—If, after the decree, a diminution were to take place in the number of the *Akila*s, those would be associated with them who are nearest in point of connexion, notwithstanding this be a devolution of the fine, from the *Akila*s, as they stood at the time of the decree, upon others.—Now, if the case be as here stated, how can such a devolution take place?

REPLY.—The associating of others, as here mentioned, is a confirmation of the decree, not an annulment of it; for in consequence of such association the number of those who are to pay the fine imposed by the decree is increased. It is otherwise in the case in question; for there the devolution would amount to an annulment of the decree.

—Accordingly,

Accordingly, if the residence of the slayer be at *Kobfa*, and he have his pay appointed to him, and he take up his residence at *Basra* before the *Khadr's* decree of fine has issued, the *Khadr* must in that case decree it to be paid by the people of *Basra*;—whereas, if he had taken up his residence in that place subsequent to the decree having issued, the decree would not revert. In the same manner also, if an inhabitant of the desert commit homicide, and the sovereign afterwards appoint him pay in any particular register previous to the *Khadr's* decree of fine, the *Khadr* must decree the fine upon those with whom he is registered;—whereas, if the registry took place subsequent to a decree passed by the *Khadr* against his *Akila* of the desert, the decree could not revert. This is contrary to where one of the inhabitants of the desert, to whom no pay has been appointed, commits homicide by misadventure; and the *Khadr* issues a decree of fine, to be paid from their property in three years; and afterwards the sovereign takes them into his army and appoints them pay;—for in this case they are to account for the fine out of their pay, notwithstanding the decree had ordained it out of their property; because here the decree is not, in fact, annulled, since their pay is also their property, and the payment from that is more easily effected than from their other possessions.

Examples and rules to be observed in this instance.

The *Akila*s of an emancipated slave are the family and kindred of his emancipator, they being considered as his *aiders* and *assistants*; and in the same manner, the *Akila*s of a client under a contract of *Mawalat* are his patron,†, and the kindred of his patron, as those are his assistants.

The *Akila*s of a freed-man, or client, are, his emancipator's or patron's family.

\* See Vol. III. p. 448.—The client under a contract of *Mawalat* is, generally, a proselyte, adopted by the person to whom he owes his conversion to the faith; and the law thus provides him *Akila*s, as he stands unconnected with the *Musfidan* community, other wise than by the contract of *Mawalat*.

† The person who has adopted him.

The *Akilas* are not liable, where the fine is short of a twentieth,

Any fine short of the twentieth part of the *dayit*, or complete fine, is not due from the *Akilas*; but a twentieth, or any proportion above that, falls upon them;—for *Ibn Abbas* has recorded a saying of the prophet, “*AKILAS are not to pay a fine for wilful murder, nor any thing incurred by the offence of a slave, or in consequence of a composition, or by the acknowledgment of the offender, or (in short) any thing less than the mulct for a cat*”;—and the mulct for a cat is a twentieth of the *dayit*, or complete fine. Besides, the fine is imposed upon the *Akilas*, for this reason among others, lest the payment of it might prove ruinous to the offender himself; which, however, is not to be apprehended from any thing short of a twentieth of the whole, as that is, comparatively, but a small matter, and therefore not likely to prove essentially injurious to him.—(The limitation, in this particular, to a twentieth, is upon the authority of the *KORAN*.) What is here mentioned applies solely to the fine for offences short of life;—for where life is concerned, the *Akilas* must pay the fine, notwithstanding it fall short of a twentieth of the complete fine;—as where, for instance, a person kills a slave, whose value is less than a twentieth of the complete fine; in which case the murderer's *Akilas* are liable for the value, that being the fine for a slave.

unless it be incurred in a case of homicide,

when it falls solely on the offender.

If, by any offence not affecting life, a fine be incurred short of a twentieth, it is due from the property of the offender, upon a favourable construction. Analogy would suggest that it is the same thing, in this particular, whether the fine be *more* or *less*; in other words, if it be *less* than the twentieth, still it falls upon the *Akilas* in the same manner as if it were *more*; (and such is the opinion of *Shaf'ii*;) or else nothing whatever falls upon them, whether it be *more* or *less*. The reason, however, for a more favourable construction is, that the prophet decreed that the fine for an embryo in the womb should be paid by the *Akilas*; and the fine for an embryo is a twentieth of the fine for a man, (as was formerly mentioned.)—Any thing, therefore, short of

of the mulct for a cut stands upon the same footing with a matter of property, as being an equitable adjudgment, rendered obligatory by an arbitration,—in the same manner as a compensation for property is rendered obligatory by appraisement; and accordingly, it is due from the property of the offender.

AKILAS are not liable for any thing incurred by the offence of a slave, or in consequence of a composition, or by the acknowledgment of the offender; because of the tradition of *Ibn Abbas* above quoted; and also, because a slave does not come within the description of a coadjutor, nor does he receive aid from any one;—and acknowledgment or composition cannot be admitted in proof against the *Akilas*, the acknowledger, or compounder not being possessed of any authority over them. *Akilas*, therefore, are not liable for any thing incurred by the acknowledger;—unless, however, they verify his acknowledgment; in which case they are liable for the fine, as they here admit the plea of the avengers of the offence, and such admission is proof against them.

Cases in which the *Akilas* are not liable to fine.

If a person make an acknowledgment of homicide by misadventure, and the avengers of the offence neglect applying to the *Kāzee* until after two years, the *Kāzee* must then award the fine to be paid in three years from the date of his decree; for as a delay of payment for three years from the date of the decree is admitted in a case of homicide established upon proof, it is consequently allowed in a case of acknowledgment *a fortiori*.

If the murderer and the avenger of offence coincide, and agree that “such a *Kāzee*, of such a place, has decreed, upon the testimony of witnesses, a fine against the *Akilas* of him [the slayer] residing in *Kaofa*,”—and the *Akilas* deny this, they are not liable for any thing; because each party affirming the other's assertion is no proof against them. Neither is the murderer himself liable for any thing;



for it appears that the fine was decreed against the *Akila* solely on the ground of a mutual confirmation between the murderer and the avengers of blood, which confirmation is a proof against the *Akila*, but not against the murderer himself. Nothing, therefore, falls upon him;—unless, however, he be enrolled and have pay appointed to him in the same register with the *Akila*; in which case he is to pay his proper share of the fine; because with respect to his share of it he has made an acknowledgment against himself; and his acknowledgment so far as it merely affects himself, must be admitted in proof against him; but with respect to the shares of the *Akila*, he has made an acknowledgment affecting others; and an acknowledgment tending to affect others cannot be admitted.

In case of the murder of a slave, his value is due from the *Akila* of the murderer;

If a person accidentally kill a slave, the fine, namely, the value of the slave, is due from the *Akila* of the slayer, because it is a consideration for the person, as was before mentioned. According to an opinion of *Shaf'i*, it is due from the property of the slayer, as being in fact, a consideration for property; whence (as he maintains) the slayer is responsible for the slave's value to whatever amount. The former opinion is approved.

but they are not responsible for any thing incurred by an offence upon the members of a slave.

If a freeman commit an offence upon any part or member of a slave, the atonement for such offence does not fall upon the *Akila*; for as (according to our doctors) the members of a slave are a species of property, it is therefore due from the property of the offender, without affecting any others; agreeably to the arguments already set forth upon that head. According to an opinion of *Shaf'i*, on the contrary, it is due from the *Akila*, in the same manner as where a similar offence is committed upon a freeman. The former opinion is approved.

If there be no *Akila*, the fine is paid out of the treasury.

Our doctors teach that, in a case where the slayer is destitute of *Akila*, the fine is due from the public treasury, the whole *Mussulman* community being held to be the siders of a person so situated. As, moreover,

moreover, if this person were to die, his property would go, as an inheritance, to the public treasury, it follows that any thing incurred by him must be paid therefrom.

The child of a woman divorced by *Lān* [affeveration] has, for his *Akīlas*, his maternal kindred, his descent being established from his mother, not from his father\*. If, however, his maternal *Akīlas* having paid the fine, his father should afterwards claim or acknowledge him, his maternal *Akīlas* are entitled to take, from his paternal *Akīlas*, in three years from the time of the *Kāzee* passing a decree of reimbursement in their favour, whatever they may have so paid; because it then appears that the fine was due from the paternal *Akīlas*, not from the maternal; for the father, by claiming him, falsifies himself, (in other words, acknowledges that he had affeverated falsely;) whence it is evident that the child's descent stood established in the father from the beginning, his affeveration being rendered null by his subsequent falsification;—and upon its thus appearing that the maternal *Akīlas* have paid what was in fact due from the paternal, the former are consequently entitled to reimburse themselves from the latter, as they disbursed the fine,—not in a *gratuitous* manner, but *per force*, in pursuance of the *Kāzee*'s decree.—In the same manner also, if a *Mohān* die, leaving property sufficient to discharge his ransom, and a son, a freeman, (by being born of his wife who was free,) and the son neglect discharging the ransom until at length he happens to kill a person by misadventure, and his maternal kindred pay the fine, and he then discharge the ransom, they [the maternal kindred] are in that case entitled to recover from the father's tribe whatever they may have so paid;—because, upon the son discharging the ransom, he becomes connected with his father's family from the last instant of his [the father's] life, wherefore it appears that the maternal kindred have paid what was in fact due from the paternal,—not in a *gratuitous*

Case of fine incurred by a child born under a marriage dissolved by affeveration.

\* See Vol. I. p. 349.

manner,

manner, but *per force*, in pursuance of a judicial decree. In the same manner, also, if a man instigate a boy to slay any person, and he slay the person accordingly, and his *Akilas* pay the fine, they are afterwards entitled to recover the same from the *Akilas* of the instigator, upon the instigation being established by proof; or, if the instigation be established, not by *proof*, but by the acknowledgment of the instigator, they recover it from his property. It is to be observed, however, that the boy's *Akilas*, in this instance, take their reimbursement from the instigator, or his *Akilas*, in three years from the time of the *Kázee's* passing a decree in their favour, this indulgence in point of time being allowed, in the payment of fines, in order that distress may be avoided.

Four primary examples, which give rules for determining concerning the imposition of fine upon *Akilas*.

THE compiler of the *Hedaya* remarks that here follow a great variety of cases and examples, stated by *Mohammed*, the primary of which are four.—I. Where the state of the slayer is changed, and his *Willa* transferred to others by some supervenient occurrence, (such as manumission;) in which case his offence is not transferred from his former *Akilas*, whether the *Kázee* issue a decree, or not.—For instance:—the male slave of some person marries the female slave of some other person; and her master emancipates her; and within six months thereafter she brings forth a child; and this child committing manslaughter, the fine falls upon the *Akilas* of the mother;—and the male slave's master afterwards emancipates him, in consequence of which the *Willa* of the child appertains to him:—in which case the fine incurred by the child's offence still rests upon the mother's *Akilas*, and does not devolve upon the father's *Akilas*, whether the *Kázee* have issued his decree of fine for the offence or not.—II. Where some unlooked for circumstance occurs (such as a claim laid to a child born of a woman divorced by *Idan*;) in which case the matter is transferred from the *Akilas* on the one side to the *Akilas* on the other;—as has been explained in the example before stated. (The case of the *Mokátib*, there mentioned, also proceeds on this ground; because upon the payment of the ransom he

he appears to have been free from the instant of his demise; and hence it does not rest upon the *former* ground; for here the cause is altogether *unexpected*, and is therefore not merely a *supervenient occurrence*.)—III. Where the state of the offender is not altered, but his *Akilas* changed, in this way, that his registry was at *Koofa*, and was, after his offence, transferred to *Basra*;—in which case regard must be paid to the decree of the *Kázee*; in other words, if he have decreed the fine against the former *Akilas*, and the *Akilas* be then changed; the matter does not devolve upon the latter *Akilas*; but if the *Akilas* be changed previous to the *Kázee*'s decree of fine against the first *Akilas*, he must in that case decree it against the latter *Akilas*.—IV. Where the *Akilas* still continue the same, but obtain an increase, (by there having been among them an *infant*, who in the interim attains to majority, or by some of them dying, and others of the nearest tribe being conjoined in the fine;)—in which case the additional *Akilas* are associated with the original *Akilas* in the payment of the fine, whether the *Kázee* have decreed a fine against the *Akilas*, or not,—excepting only with respect to such part as may already have been paid by the former *Akilas*.—Whoever pays due attention to these four primary examples, as grounds of proceeding in this particular, will be enabled to form a judgment, and determine upon almost every case which can occur.

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# H E D A R A.

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## B O O K LII.

### Of *WASÀRÁ*, or WILLS.

Definition of  
the terms  
used in wills.

*WASÀRÁ* is the plural of *Waseeat*.—*Waseeat* means an endowment with the property of any thing after death,—as if one person should say to another, “ give this article of mine, after “ my death, to a particular person.”—The thing so given is termed the *Moofee bé bee*, or legacy;—the person who wills that it be given is denominated the *Màwfee*, or testator; the person in whose favour the will is made is called the *Moofee lé boo*, or legatee;—and the person appointed to carry the will into execution is called the *Wasee*, or executor.

- Chap. I. Of Wills that are legal, and Wills that are laudable;  
and of the Retractation of Wills.
- Chap. II. Of the Bequest of a Third of the Estate.
- Chap. III. Of Emancipation upon a Deathbed; and of Wills relative to Emancipation.
- Chap. IV. Of Wills in favour of Kinsmen, and other Connections.
- Chap. V. Of Usufructuary Wills.
- Chap. VI. Of Wills made by *Zimnees*.
- Chap. VII. Of Executors, and their Powers.
- Chap. VIII. Of Evidence with respect to Wills.

## C H A P. I.

Of Wills that are legal, and Wills that are laudable;  
and of the Retractation of Wills.

**W**ILLS are lawful, on a favourable construction. Analogy would suggest that they are unlawful; because a *bequest* signifies an endowment with a thing in a way which occasions such endowment to be referred to a time when the property has become void in the proprietor, [the testator;]—and as an endowment with reference to a future period, (as if a person were to say to another, “ I constitute you pro-

Wills are  
lawful, and  
valid

O o o 2

“ prior

“priotor of this article *on the morrow*,”) is unlawful, supposing, even, that the donor’s property in the article still continues to exist at that time, it follows that the suspension of the deed to a period when the property is null and void, (as at the decease of the party,) is unlawful, *a fortiori*. The reasons, however, for a more favourable construction, in this particular, are twofold.—FIRST, there is an indispensable necessity that men should have the power of making bequests; for MAN, from the delusion of his hopes, is improvident, and deficient in practice; but when sickness invades him he becomes alarmed, and afraid of death. At that period, therefore, he stands in need of compensating for his deficiencies by means of his property;—and this in such a manner, that if he should die of that illness, his objects (namely, compensation for his deficiencies, and merit in a future state) may be obtained,—or, on the other hand, if he should recover, that he may apply the said property to his wants;—and as these objects are attainable by giving a legal validity to wills, they are therefore ordained to be lawful\*.—SECONDLY, wills are declared to be lawful in the KORAN and the traditions; and all our doctors, moreover, have concurred in this opinion.

to the extent  
of a third of  
the testator’s  
property;

IF a person make a will in favour of a stranger, to the amount of a third of his property, it is valid, although the heirs of the testator should not be consenting thereto; for it is so recorded in the traditions.

but not to any

A BEQUEST to any amount exceeding the third of the testator’s

\* In this place are stated an *objection* and *reply*, which the translator has omitted in the text, in order to avoid an interruption of the subject.—*Viz.*

“OBJECTION.—If the right of property in the proprietor become extinct at his decease, how can his act of endowment be then valid?”

“REPLY.—His right of property is accounted to endure at that time from necessity,—in the same manner as holds with respect to executing the funeral rites, or discharging the debts of the dead.”

property

property is not valid. In proof of this the following tradition is further ex-  
 quoted, as delivered by *Abec Vekâfs*. “ In the year of the conquest  
 “ of *Mecca*, being taken so extremely ill that my life was despaired  
 “ of, the prophet of GOD came to pay me a visit of consolation. I  
 “ told him, that, by the blessing of GOD, having a great estate, but  
 “ no heirs, except one daughter, I wished to know ‘ *if I might dispose*  
 “ *of it ALL by WILL.*’ He replied, ‘ *No !*’ and when I severally in-  
 “ terrogated him ‘ *if I might leave TWO THIRDS, or ONE HALF ;*’  
 “ he also replied in the negative ;—but when I asked *if I might leave*  
 “ *A THIRD*, he answered, *Yes, you may leave A THIRD of your pro-*  
 “ *perty by will : but a third part, to be disposed of by will, is a great*  
 “ *portion ; and it is better you should leave your heirs rich, than in a*  
 “ *state of poverty, which might oblige them to beg of others.*”—Besides,  
 the right of the testator’s heirs is connected with his property ; for  
 when he is in his last illness he has no further use for it ; and as this is  
 the cause of the title to it becoming null and void in him, and vesting  
 in the heirs, their right therefore, at that period, becomes connected  
 with it accordingly. This right, however, is not recognized by the  
 LAW, with respect to a stranger, to the extent of one-third of the  
 estate, in order that the testator may be enabled, by bequeathing a  
 third of his property out of his family, to atone for his past deficiencies,  
 as before mentioned. With respect to the heirs *themselves*, on the  
 contrary, this connexion of right is recognized to the extent of the  
*whole* of the testator’s property ; (whence it is that if a person should  
 dispose of a third of his property to a part of the heirs, it would not be  
 valid ;) for if no regard were paid to the connexion of their right with  
 the whole of the property, with respect to themselves, so as to legalize  
 the bequeathing a third of it to a part of them, in that case the object  
 of a will (namely, a compensation for deficiencies) might not be at-  
 tended to, as it is possible that the testator, instead of including the  
 whole of the heirs, might leave the third only to a select part of them ;  
 and this would be an injury to the others, and would consequently  
 induce a breach of the ties of kindred, which is unlawful. It is to be  
 observed,



unless by the  
consent of the  
heirs.

observed, however, that although a will, bequeathing more than a third of the testator's property, be not lawful, yet if the heirs, being arrived at the age of maturity, should give their consent to it, after the death of the testator, it then becomes valid; for the objection to its validity is founded merely on a regard to their right, and therefore does not operate any longer, after they themselves agree to forego such right. Their consent, indeed, during the lifetime of the testator, is not regarded; for as this is an assent previous to the establishment of their right, they are therefore at liberty to annul it upon the death of the testator. It is otherwise where the consent is given *after* that event; for as this is an assent subsequent to the establishment of their right, they are not afterwards at liberty to annul it.

A bequest to  
an heir is not  
valid unless  
confirmed by  
the other  
heirs.

WHERE a person makes a will in favour of part of his heirs, the same rule holds as in the case of bequeathing more than a third to a stranger;—in other words, the deed is not valid, unless the other heirs give their consent to the disposition after the death of the testator; and their consent *previous* to his death will have no effect. It is to be observed that, in every instance where a will is rendered valid by the consent of the heirs, the legatee derives his property from the *testator*, not from the *heirs*. This is the opinion of our doctors. *Shaftei* maintains that he derives his property from the heirs. The opinion of our doctors is approved; for the will of the testator is the occasion of the property, the consent of the heirs being only the removal of a bar; and as the law has regard to the cause, not to the removal of a bar, the property is therefore derived from the testator, not from the heirs;—(whence it is that seizin is not requisite\*; for if the property were derived from the heirs, seizin would be requisite; because the transfer of property from a living proprietor, without receiving any thing in return, is in effect a *gift*, to the establishment of which

\* Meaning, “the testator's taking possession of the bequest is not requisite to the establishment of his right in it.”

the

the feizin of the donee is a necessary condition ;)—in the same manner as where a pawner sells the pawn, in which case the ratification of the deed of sale rests entirely on the pawnee, and if he give his consent, the sale is valid, and the purchaser derives his property in the article sold from the *pawner*, not from the *pawnee*.

IF a person make a bequest in favour of another from whom he has received a mortal wound, it is not valid ; whether the murderer be one of his heirs, or a stranger, or whether he may have wounded him wilfully or by misadventure, provided he be the actual perpetrator of the deed ; because it is recorded in the traditions, that “ there is no *legacy for a murderer* ;” and also, because, as the person who gave the wound has hastened the death of the testator, he is, by way of punishment, excluded from the benefit of the will, in the same manner as a person under similar circumstances is excluded from inheritance.—So likewise, where a man, having made a bequest in favour of a particular person, is afterwards killed by that person, such bequest is invalid.—If, however, in these cases, the heirs should give their consent, the bequest then becomes valid, according to *Haneefa* and *Mohammed*.—*Abou-Yoosuf* is of a contrary opinion ; because the offence of the murderer, which is the cause of the invalidity of the will, still exists.—The arguments of *Haneefa* and *Mohammed* upon this point are twofold.—FIRST, the defect in the validity of the will, *with respect* to the murderer, is on account of the right of the heirs ; because the advantage of such defect results to them, as in the case of exclusion from inheritance.—SECONDLY, the defect in the validity of the bequest, as made *in favour* of the murderer, is owing to the heirs withholding their consent, in the same manner as in the case of a will in favour of part of the heirs ; and consequently, as the consent of the remaining heirs, in that instance, establishes the validity of the will, it follows that the consent of the heirs at large must have the same effect in the case in question.

A bequest to a person from whom the testator had received a mortal wound is not valid ;

and if a legatee slay his testator, the bequest in his favour is void.

IF

A bequest to  
a part of the  
heirs is not  
valid.

If a man make a bequest in favour of a part of his heirs, it is not valid; because of a traditional saying of the prophet, “*God has allotted to every heir his particular right*”; and also, because a will in favour of a part of the heirs is an injury to the rest; and therefore, if it were deemed legal, would induce a breach of the ties of kindred.—Besides, it is said, in the traditions, “*a bequest to particular heirs is unjust*.”—It is to be observed that in judging whether the legatee be an heir, or otherwise, regard is paid to the time of the testator's death, not to the period of making the will; because the efficacy of the will is established after the death of the testator.—(The gift of a dying person\* is in this respect of the same nature with a legacy, both being the same in effect, and is therefore executed to the amount of a third of the property.)—If, on the contrary, a dying person make an *acknowledgment* in favour of a part of his heirs, regard is paid to the time of such acknowledgment; because the acknowledgment of a dying person is an immediate and complete act of his own, and has not any reference to a future period;—and such being the case, it follows that it is not valid in favour of any who were actually heirs at the time of making it,—and that it *is* valid with respect to such as were not heirs at that time; although they should become so afterwards;—as where, for instance, a person makes an acknowledgment in favour of his child, who is a slave, and the child recovers his freedom before the death of the father; in which case the acknowledgment so made is valid, notwithstanding the child, by the recovery of his freedom, became one of his father's heirs;—for as, at the time of the acknowledgment, he was not an heir†, any acknowledgment made in his favour was virtually made in favour of his master, who was a stranger;—and the validity of the acknowledgment being once established, it does not afterwards admit of being annulled from the cir-

\* Arab, *Mareez*. Literally, *sick*,—but always (in the language of the LAW) meaning, “*sick of a mortal illness*.”

† A slave cannot possess any right of inheritance.

cumstance

cumstance of the child's becoming an heir.—It is to be observed, however, that although a bequest in favour of a part of the heirs be not valid, yet it is rendered so by their consent, as was already mentioned.—If, moreover, a part should give their consent, and part withhold it, the bequest then becomes valid in proportion to the amount of the shares of those who consent, and invalid in proportion to the amount of the shares of the others.

THE bequest of a *Mussulman* in favour of a *Zimnee*, or of a *Zimnee* in favour of a *Mussulman*, is valid: the former, because God has said, in the KORAN, “YE ARE NOT PROHIBITED, O BELIEVERS, FROM  
“ACTS OF BENEVOLENCE TOWARDS THOSE WHO SUBJECT THEM-  
“SELVES TO YOU, AND REFRAIN FROM BATTLES AND CONTEN-  
“TIONS;”—and the latter, because *Zimnees*, in virtue of their compact with the *Mussulmans*, are considered in the same light with them in all temporal concerns; and as, on this principle, an intercourse of good offices towards each other is held lawful during life, they are therefore in the same manner permitted to extend beyond the grave.—It is related in the *Jama Sagheer* that a will in favour of an hostile infidel is not valid, as God has prohibited, in the KORAN, the exercise of benevolence towards them.

Bequests are valid between *Mussulmans* and *Zimnees*.

THE acceptance or rejection of a bequest is not established until after the death of the testator; for as the bequest does not take effect before that event, those cannot be previously regarded.—Hence the acceptance or rejection during the life of the testator has no effect, in the same manner as an acceptance declared before the existence of a contract.—If, therefore, a legatee accept a bequest after the death of the testator, it is valid, notwithstanding he may have rejected it during his lifetime.

The acceptance or rejection of them is not determined until after the death of the testator.

IT is preferable and most advisable not to leave legacies, if the heirs be poor, and their particular portions not such as to enrich them;  
VOL. IV. P p p because

It is laudable to avoid making them

where the  
heirs are poor.

because this manifests benevolence to the heirs, who have a superior claim to it from the relation in which they stand, God having declared, in the KORAN, "THE EXERTIONS OF GENEROSITY TOWARDS RELATIVES IS MORE LAUDABLE THAN TOWARDS STRANGERS."— Besides, in this an observance of two claims is maintained, namely, that of poverty and consanguinity. If, on the contrary, the heirs be rich, or the particular portions assigned to them be such as to enrich them, it is most advisable to leave something short of a third of the estate in legacies, as a legacy to a stranger is an act of charity, whereas the bestowal of the whole upon the heirs is a gift; and the former is more laudable than the latter, being calculated to gain the favour and good will of God. Some have said that in such case the proprietor is under no restraint, but is perfectly at liberty to make a will in favour of strangers, or to suffer the whole to pass to the heirs, as each has its particular merit, the first being an act of generosity, and the second an obedience to the dictates of natural affection.

The legatee  
becomes proprietor of the  
legacy by his  
acceptance  
of it;

THE property of a legatee in a legacy is established by his acceptance of it. *Ziffer* is of opinion that a legacy is like an inheritance; because the legatee acquired the property by transition from, and succession to, the testator, in the same manner as an heir acquires it by succession to and descent from the last possessor; and therefore his acceptance is not necessary towards the establishment of the property, in the same manner as holds in the case of inheritance.—Our doctors, on the contrary, argue that a legacy establishes the property in the legatee *de novo*, and does not vest by succession and descent as in the case of inheritance;—(whence it is that a legatee cannot reject the legacy on account of any defect; in other words, if a person, having purchased a *slave*, for example, should bequeath him to another, and the legatee, after the death of the testator, discover the slave to have some fault or defect, it would not, on this account, be in his power to return him to the seller, as an heir, in a similar case, would be entitled to do;—and likewise, that nothing can be returned to a legatee on account of a defect;

a defect; in other words, if a person should bequeath his whole estate by will, and afterwards sell something belonging to it, and the buyer discover a defect in the same, still he would not have the power of returning it to the legatee, whereas he might to an heir;) —and such being the case, it rests, therefore, entirely on his acceptance, as no person can be made proprietor of any thing against his will. Inheritance, on the contrary, is a succession; (whence it is that the rules above mentioned have effect in it;) and an heir is therefore, as it were, *forcibly* put in possession of his inheritance, by the especial ordinance of the LAW, the validity of it not being suspended on his acceptance or consent. It is to be observed that acceptance, in cases of bequest, is of two kinds.—I. Express, which needs not to be explained.—II. Implied, which is where the legatee dies without having either declared his acceptance or refusal; for this also is an acceptance in effect; because the bequest is rendered complete on the part of the testator by his death, (in other words, it cannot be rescinded after that event;) and as it was suspended in its effect purely in deference to his right of rejection, it of course falls into his property upon his demise;—in the same manner as holds in a case of sale with a reserve of option to the purchaser; in which instance, if the purchaser die without formally signifying his assent to the sale, it is then regarded as complete, and the article sold is considered as part of his estate.

which may be either *express* or *implied*.

If a person deeply involved in debt bequeath any legacies, such bequest is unlawful and of no effect; because debts have a preference to bequests, as the discharge of debts is an absolute duty, whereas bequests are gratuitous and voluntary; and that which is most indispensable must be first considered. If, however, the creditors of the deceased relinquish their claims, the bequest is then valid, the obstacle to it being removed, and the legatee being supposed to stand in need of his legacy.

Bequest by an insolvent person is void;

and so likewise by an infant,

BEQUEST by an infant is not valid. *Shafei* maintains that it is valid, provided it be made to a discreet and advisable purpose; because *Omar* confirmed the will of a *Raffai*, (that is, a boy who has nearly reached the age of maturity;) and also, because in the execution of it a degree of advantage results to the infant, inasmuch as he acquires the merit of the deed,—whereas in the annulment of it he is deprived of all advantage. The arguments of our doctors, in support of their opinion upon this point, are twofold.—FIRST, a will is a voluntary act, concerning which an infant has not a capacity of forming a proper judgment. SECONDLY, the declaration of an infant is not of a binding nature; but if the validity of a bequest by such were admitted, that effect would follow of course.—With regard to the tradition of *Omar*, the term *Raffai*, there used, must be understood to mean a person just arrived at the age of maturity, or, “the will of the *Raffai*” relates merely to the celebration of his obsequies, which is lawful in the opinion of our doctors. Besides, the annulment of the will is advantageous to the infant, since in allowing his property to pass to the heirs the rights of natural affection are maintained, as before mentioned. With respect to the assertion of *Shafei*, that “in the execution of “the will an advantage results to the infant,” it may be replied that the point to be attended to, in cases of advantage or loss, is, the immediate tendency of any act or deed, and not what may eventually result from it; in other words, if the deed itself, in its immediate tendency, produce advantage, the execution of it on account of the infant is preferable; but in the case here considered the deed, (that is, the bequest) in its immediate tendency, leads to a loss of property, although eventually the infant have an advantage, the bequest having been made with a view to obtain merit in the eye of God; and since the bequest of the infant, in its immediate tendency, occasions a loss, it is not valid;—in the same manner as holds in case of a divorce; in other words, if an infant divorce his wife, or his guardian do so on his behalf, it is not binding, notwithstanding a divorce may on many occasions be attended with advantage,—as where an infant, having a wife

wife who is poor, wishes to divorce her, and marry her sister, who is rich and handsome.—In short, bequest by an infant is invalid, according to our doctors;—and in the same manner, if an infant should make a will, and die after he had attained to maturity, the will is not valid, as having been made at a time when he was unqualified for such an act; and so likewise, if an infant should say, “It is my will, whenever I reach the age of maturity, that a third of my estate be considered as a legacy in favour of a particular person,” the will is not valid; because an infant, being unqualified, is not competent to make a will that shall be deemed valid immediately, or that can be rendered so by being suspended to a future period; in the same manner as he is incapable of divorce or emancipation. It is otherwise with respect to a slave or a *Mokâtib*; for they possess a complete competency, obstructed merely by the right of their master; and therefore all their acts (such as divorce, bequest, or so forth) are perfectly valid if referred to a period when that bar no longer exists; as where a slave (for instance) says: “I declare my wife to be divorced *whenever I am free*.”

BEQUEST by a *Mokâtib* is not valid, notwithstanding he leave effects sufficient to discharge his covenanted ransom; because the property of a *Mokâtib* is not a fit subject of gratuitous acts. Some assert that this is according to *Haneefa*; but that the two disciples hold a contrary opinion.

A WILL in favour of a foetus in the womb, and a will bequeathing a foetus, are both valid, provided the birth happen in less than six months from the date of the will. The ground on which the first case proceeds is, that a legacy is, in a manner, a succession to property; and as a foetus is capable to succeed in the case of inheritance, it is so likewise in the case of a legacy, that being analogous to inheritance. If, however, the legatee should reject the legacy, it is rejected accordingly, as a bequest bears also the sense of an *endowment*, which may be declined. It is different with *inheritance*, as that is purely

A bequest of (or in favour of) a foetus in the womb is valid.



purely a *succession*, and is not annulled by the rejection of the heir.— Gift, moreover, differs from bequest, it not being (like bequest) admitted in favour of a foetus; for gift is purely an *endowment*; and no person can endow a foetus with any thing. The ground, on the other hand, on which the second case proceeds is, that the existence of the foetus is understood at the period of making the will; and as the legacy of things not yet in being (such as the fruit a tree may hereafter yield) is valid, it follows that a legacy of a thing actually existing is valid *a fortiori*.

A female slave may be bequeathed with the exception of her progeny.

IF a person bequeath a female slave, and except the offspring of her womb, both the bequest and the exception are valid. The *bequest* is valid, because the words "female slave" do not include the offspring. As, however, in the bequest of a female slave, her offspring is included dependantly, where the bequest is absolute, it follows that where a slave is bequeathed with an exception of her offspring, such bequest is valid. The *exception* also is valid; because as it is permitted to bequeath a foetus in the womb, it is also allowable to except it from a legacy; for it is a rule that whatever is in itself capable of being the subject of a deed may also be excepted from that deed; and *vice versa*. Besides, the acceptance of the legatee is suspended until the death of the testator; and the annulment of the declaration, previous to the acceptance, is valid, as in a case of *sale* for instance.

A bequest is rescinded by the express declaration of the testator; or by any act on his part implying his retraction,

UPON the testator either expressly rescinding his bequest, (as if he were to say, "I retract what I had bequeathed,") or performing any act which argues his having rescinded it, retraction is established. It is established, in the former instance, evidently; and so likewise in the latter; for as acts are demonstrative of the inclination as much as express words, they are consequently equivalent thereto.—It is to be observed, that if the testator perform, upon the article he had bequeathed, any act which, when performed on the property of another,

other, is the cause of terminating the right of the proprietor, (such as the slaughter of a goat, or the fleaing, roasting, or boiling of it, the fabrication of a vessel from a piece of copper, the grinding wheat into flour, or the fabrication of a sword from iron,)—such act is a retraction of the bequest. If, also, he perform upon it any act creating an addition to the legacy, and this addition be so connected, that the legacy cannot be separately delivered, (as where a person bequeaths the flour of wheat, and afterwards mixes it with oil,—or a piece of ground, and afterwards erects a building on it,—or undrest cotton, and afterwards dresses it,—or a piece of cloth, and afterwards lines or covers a gown with it,)—such act is a retraction of the bequest. It is otherwise with respect to plaistering the wall of a bequeathed house, or undermining the foundation of it; for these acts do not indicate a retraction of the bequest, as they affect the legacy in its *dependancies* only.

EVERY act or deed which occasions an extinction of the property of the testator is a retraction from his bequest,—(as where, for instance, a testator sells the article he had bequeathed, and afterwards purchases it,—or gives it to some person, and afterwards retracts the gift,)—and consequently, the legacy does not go to the legatee after his [the testator's] decease;—because a will can hold good only with respect to the testator's property; and therefore, upon his property being extinguished, the bequest becomes null of course. (It is to be observed that the washing of a bequeathed garment is not a retraction from the bequest; on the contrary, it is rather a confirmation of it, as it is a custom to wash garments before they are given to any person.)

or which extinguishes his property in the legacy.

If a testator deny his bequest, and the legatee produce witnesses to prove it, there is in that case a difference of opinion among our doctors;—for according to *Mohammed* this is not a retraction;—whereas *Abou Yoosaf* maintains that it is so, because *retraction* signifies

The testator's denying his bequest is not a retraction of it;

nifies the testator negating his bequest *at the present time*; and as the denial is a negative applying both to the *present* and to the *past*, it therefore amounts to a retraction *a fortiori*. The argument of *Mohammed* is, that the denial of a bequest signifies the putting a negative upon it with respect to the *past*, of which its being negated with respect to the *present* is a consequence; and upon the bequest being proved, by witnesses, to exist at present, the denial is of no effect. Another argument is, that as a retraction implies the former existence of a will, and the present annihilation of it, and denial (on the other hand) disavows both the former and the present existence of it, there is therefore an evident difference between a retraction and a denial; whence the latter ought not to be considered in the light of the former;—and accordingly, denial not being a retraction, if a husband deny his marriage, and the wife bring witnesses to prove it, still a separation does not take place between them.

nor his declaring it *unlawful* or *usurious*,

If a testator declare the will he has made in favour of a particular person to be *unlawful* or *usurious*, this is not a retraction, because the specification of it under the description of illegality or usury is a plain proof that the subject of the description (namely, the will) does actually exist. The case would be different if he should declare the will to be *null*; for that is evidently a retraction; because, as a thing which is null is non-existent, the description of *null* evinces that the thing so described no longer exists. It is otherwise with the description of unlawful; for that indicates a continuance of the existence, as illegality cannot apply to a *nonentity*.

or desiring the execution of it to be deferred.

If a testator should desire that the execution of his will be suspended for some time after his death, this is not a retraction. If, on the contrary, he say “I depart from my will,” he is then held to have retracted it.

If

If a person say, "I will that a particular slave, which I formerly bequeathed to *Zeyd*, be given as a legacy to *Amroo*," in that case "a retraction from the first will is established, as the tenor of his speech evidently shews that it was not his intention they should both partake of the legacy. It is otherwise where a person first leaves a particular article to one man, and then leaves the same thing to another;—as if he should say, "I will that this thing be given to *Zeyd*," and afterwards make a bequest of the same thing in favour of *Amroo*;—for in that case a retraction of the first will does not take place; the subject being capable of division, and the separate sentences bearing that construction.

A bequest to one person is annulled by a subsequent bequest of the same article to another,

If a person say, "the slave which I formerly left to *Zeyd* I now bequeath to *Amroo*," and at that time *Amroo* be not alive, the first will, in favour of *Zeyd*, holds good; for *that* was annulled only on account of the legacy having been completely devised to *Amroo*; and upon this no longer remaining in force, because of *Amroo*'s death, the first will reverts.—If, on the contrary, *Amroo* be alive at the time of the bequest in his favour, and afterwards die before the testator, the legacy [the slave] in that case passes to the heirs, both bequests being void,—the first, because of the retraction,—and the last, because of the death of the legatee previous to that of the testator.

unless that other be not then alive.

## C H A P. II.

## Concerning the Bequest of a Third of the Estate.

Case of a person bequeathing two thirds of his property to two persons respectively;

IF a person bequeath a third of his property to one man, and a third to another, and the heirs refuse their consent to the execution of both bequests, one third is in that case divided equally between the two legatees; for where the will exceeds a third of the estate, and the heirs refuse their consent to the execution of the whole, it is then restricted to one third, as has been already explained; and as, in the present instance, the right of both claimants is equally good, and the third is capable of division, it is therefore divided equally between them.

or a third to one and a sixth to the other.

IF a man bequeath a third of his property to one person and a sixth to another, and the heirs refuse to confirm the whole, in that case one third of the property is to be divided between the legatees in three equal lots, two to the legatee of the *third*, and one to the legatee of the *sixth*; because the bequest does not hold good for any thing beyond one third; and as both the legatees lay their claims on equally good ground, and it is impossible to discharge their demands (namely, a third and a sixth) with one third only, that is therefore shared between them in proportion to their respective claims, in the same manner as is practised with creditors, in discharging the debts of a person who dies insolvent. Here, moreover, the right of one legatee is to a sixth, and that of the other to a third; and as a third is twice the amount of a sixth, the third is therefore divided between the claimants

ants in three shares, two shares going to the one, and one share to the other.

[\* A WILL by way of *Mohabât*, on a deathbed, is the same in effect as a bequest of property, and is therefore executed to any amount not exceeding a third of the testator's estate. (*Mohabât* literally signifies a *gift*. In the language of the LAW it means a gift interwoven in some compact or deed, as if a person should sell part of his property to another at an inferior value.)

Cases of *Mohabât* wills;

If a person, having two slaves, one estimated at thirty *dirms*, and the other at sixty, should on his deathbed will that the slave worth thirty *dirms* be sold to *Zeyd* for ten, and that the other worth sixty, be sold to *Omar* for twenty,—in that case *Zeyd* obtains a *Mohabât* of twenty *dirms*, and *Omar* a *Mohabât* of forty *dirms*; and this is what is denominated a will by *Mohabât*. But if the testator should not be possessed of any other property than these two slaves, and the heirs refuse to ratify the will, in that case the *Mohabât* is executed only in the proportion of a third. Now the whole of the property is ninety *dirms*, that being the aggregate value of the two slaves: one third of that, therefore, (being thirty *dirms*;) is divided into three shares, two of which are given in *Mohabât* to *Omar*, and one to *Zeyd*; that is, the slave worth sixty *dirms* is sold to *Omar* for forty, and the other, worth thirty, to *Zeyd*, for twenty.

If a person, having two slaves, one valued at thirty *dirms*, and the other at sixty, should on his deathbed emancipate both, such manu-

\* The whole passage within the crochets seems to be an interpolation of the *Molavees* employed in the composition of the *Persian* version of the *HEKAYA*, as the translator has consulted various *Arabic* copies, without finding it in any of them. It may possibly have been inserted in some copies of the work in the manner of *marginal illustrations*, which induced the *Molavees* to give it a place in the text.

mission is in effect a bequest. If, therefore, the person in question leave no other property than these two slaves, and the heirs refuse their consent to the emancipation, it takes effect in the proportion of one third; that is to say, each of the slaves is rendered free in one third of his value, and must earn the freedom of the remaining two thirds by emancipatory labour.

and bequests  
of specific  
sums of  
money.

If a person bequeath a particular number of *dirms*, without specifying the relative proportion they bear to his estate,—such as a half, a third, a fourth, or the like,—it is valid, but is executed only to the extent of a third of his whole property, unless the heirs be willing to confirm the whole. Thus if a person, having only ninety *dirms*, should bequeath thirty to *Zeyd*, and sixty to *Omar*, and the heirs refuse their assent to it, in that case the sum of the two legacies is reduced to thirty *dirms*, of which *Zeyd* receives ten, and *Omar* twenty.]

Case of a  
person be-  
queathing the  
whole of his  
estate to one,  
and then a  
third of it to  
another.

If a person first bequeath the whole of his estate to one man, and then a third of it to another\*, and the heirs refuse their assent, in that case one third of his estate is divided into four shares, of which three are given to the legatee of the whole, and one to the legatee of the third. This is according to the two disciples. *Haneefa* alleges that the third of the estate must be divided equally between the two legatees; for in his opinion, when a legacy is extended beyond a third, the excess is of no weight in the determination. The argument of the two disciples is, that the testator has two objects in view; for *first*, he designs that each of the legatees shall receive the whole of his legacy; and *secondly*, that a superiority of the one over the other shall be maintained. Now the attainment of the *first* of these objects is impossible, because of the right of the heirs, and is, indeed, in itself impracticable; but as there is no bar to the full accomplish-

\* This supposes the testator, first, to say "I bequeath the *whole* of my property to *Zeyd*," (for instance,) and again, at some future time, "I bequeath a *third* of my property to *Amr*."

ment

ment of the *second* object, the superiority of the one over the other is preserved, in the same manner as in the cases of bequest by *Mohabât*, or emancipation, or, of legacies of a specific number of *dirms*. The argument of *Haneefa* is, that a will is null and void in whatever degree it may exceed a third of the estate, where the heirs refuse their assent; and cannot on any sort of pretext be executed in that amount, as being repugnant to the ordinance of the LAW in this particular. Since, therefore, the will is rendered null in the excess above a third, one object of the testator (namely, to establish a superiority) is also rendered null, as being comprehended in it; in the same manner as a *Mohabât* is rendered null when interwoven in a contract of sale, which is afterwards invalidated; as where, for instance, a person sells, by *Mohabât*, a slave valued at thirty *dirms* for twenty, and the sale afterwards becomes void in consequence of the loss of the subject of it previous to the delivery,—in which case the *Mohabât* also becomes void. It is otherwise in the cases of bequest by *Mohabât* or emancipation, or of legacies of a specific number of *dirms*; for there the validity does not rest on the consent of the heirs; it being eventually possible that the bequests may become valid notwithstanding the heirs should refuse to ratify them, by the testator, (for instance,) after making the bequest, increasing his property to a degree that might render the amount of the bequest no more than equal to, or less than, one third of the whole. Since, therefore, in these cases, the bequest is not in itself null, but rather stands within the possibility of being valid, a regard must consequently be paid, in such instances, to the superiority of one of the parties. It is otherwise in the case here considered; for it is in this instance impossible that the will should be valid, as has been already shewn. It is also otherwise where a person bequeaths a particular slave, valued at one thousand *dirms*, to *Zeyd*, and another, valued at two thousand *dirms*, to *Bicker*, and has himself no other property than these slaves; for although, in this case, there be a possibility that the testator may so increase his property as to render the amount of the two slaves equal to, or less than, a third of the whole, yet *Bicker* would receive a proportion



a proportion according to the third, not according to the amount of the legacy, (viz. two thousand *dirms*;) because here the right of the legatees is connected with the substance of the slaves, on this ground, that if the slave should be destroyed, the will would be rendered void, notwithstanding the testator might have acquired other property. Hence the apprehension before stated is of no weight in this instance, as the right of the legatee is here connected with the very article with which the right of the heirs has a connexion. In the case, on the contrary, of a legacy of a specific number of *dirms*, if the property of the testator be destroyed, and he afterwards acquire more, the legacy would be valid, and executed by means of the newly acquired property; whence it is plain that the right of the legatee, in the case of a legacy of a specific number of *dirms*, is not connected with the substance, and consequently is not annulled on account of its destruction.

The bequest of "a son's portion of inheritance" is void, but not the bequest of an equivalent to it.

If a person bequeath to another "*his son's portion of inheritance*," such bequest is null; whereas, if he bequeath "*an EQUIVALENT to his son's portion*," such bequest is valid; for the first is a bequest of what is the property of another, whereas the second is merely a bequest of something similar; and the semblance of a thing is different from the thing itself, notwithstanding its rate be determined thereby. *Ziffer* is of opinion that a bequest of the former nature is likewise valid; because at the time of making it the portion belonged evidently to the testator. In reply to this, however, it is to be observed, that the legacy does not take place until after the death of the testator, when the property does not belong to him, and hence his bequest of his son's portion is a bequest of property not his own.

\* In this, and several subsequent examples, the effect depends entirely upon the terms in which the bequest is conceived, and which must therefore be particularly attended to.— Thus, in the present instance, the testator is supposed to say, "*I bequeath to SUCH AN ONE my son's portion of inheritance*;" and so of the rest.

IF a person bequeath "*a portion of his estate*," the legatee is in that case entitled to the smallest portion allotted to any of the heirs,—provided, however, that such portion be not less than a sixth, for then a complete sixth must be given to him; and if it should *exceed* a sixth, in that case also a sixth is given to him; for he is in no wise to get more than a sixth. A case in which one of the inheritable portions is less than a sixth is where, for instance, a person bequeaths to another "*a portion of his estate*," and leaves heirs, at his death, a son and a wife;—in which case, although the share of the wife be only an eighth, yet the legatee receives a sixth, and the remainder is then divided between the wife and son [the heirs] according to the ordinances of the LAW. A case, on the contrary, in which all the inheritable portions exceed a sixth, is where, for instance, a person makes a bequest in the terms here stated, and dies, leaving heirs a full brother and wife; in which case, although the smallest portion be a fourth, yet the legatee is only entitled to a sixth; and that being paid to him, the remainder is then divided between the brother and wife, agreeably to the ordinances of the LAW. This is according to *Haneefa*. *Aboo Yoosaf* and *Mohammed* are of opinion that the legatee is entitled to the lowest share, whatever be its amount, provided it do not exceed a third; but if it exceed a third, an exact third must be given him, and not more, unless the heirs be consenting thereto. The argument on which they ground this opinion is, that the word *Sehm* [portion,] both in its literal and received sense, means *a portion allotted to an heir*; and as the smallest share is a matter of certainty, it is therefore adopted as the standard; except where the smallest portion of inheritance exceeds a third, in which case the bequest is executed in the proportion of a third, as a legacy exceeding a third is not valid, unless confirmed by the heirs. The argument of *Haneefa* is, that *Sehm*, according to the interpretation of the LAW, means a sixth; a legacy of a *Sehm* having been left in the time of the prophet, who ordained that a sixth of the property of the testator should be given to the legatee. In its literal sense, moreover, it bears the same meaning,

A bequest of "*a portion*" of the estate is executed to the extent of the smallest portion inheritable from it.

meaning, because *Ayāfs*, a man skilled in the *Arabic* language, who was *Kāzee* of *Bagdad*, declared that *Sehm* literally signified a sixth. Since, therefore, *Sehm*, both in the practice of the LAW, and the literal signification, means a sixth, the legatee in cases of this kind is always entitled to it, and to no more.—(Several lawyers, however, remark, that although this was the received sense of *Sehm* in those days, yet in our time it means, indefinitely, a *portion*, or *part*.)

A bequest of "part of the estate" undefined, may be construed to apply to any part.

IF a person bequeath "*a part of his property*" to another without specifying to *what amount*, the heirs are at liberty to give whatever they please to the legatee; for here the amount of the bequest is unknown; but as the uncertainty with respect to that is no bar to its validity, it is therefore valid; and such being the case, and the heirs being the representatives of the testator, it is consequently at their discretion to fix the amount, in the same manner as the testator himself might do if he were living.

Case of a person bequeathing first a sixth, and then a third, to the same person;

IF a person bequeath "*a sixth of his property*" to another, and afterwards, before the same or another company, bequeath "*a third of his property*" to that same person, in this case the legatee is entitled to a third of the testator's estate, whether the heirs be consenting or not, the sixth being included in the latter bequest of a third.

or, first a third, and then a sixth, to the same person.

IF a person bequeath "*a third of his property*" to another, and afterwards, either before the same or another company, bequeath "*a sixth of his property*" to the same person, in that case the legatee is entitled only to the sixth. (The proofs, in this instance, are drawn from the *Arabic*.)

A person bequeathing a third of any particular property, if

IF a person bequeath to another "*a third of his DIRMS*," amounting in all to three thousand, or "*a third of his goats*," amounting in all to three, and afterwards two thirds of the *dirms* or goats be lost or destroyed,

destroyed, so that only one third remains, and the remaining third do not amount to a third of the whole of the testator's property, (he having been in possession of *other* things besides the *dirms* or goats,) the legatee is entitled to the complete remaining third; that is, to a thousand *dirms* in the first case, and to one goat in the second. *Ziffer* maintains that the legatee is entitled only to one third of what remains,—that is, in the first instance to one third of one thousand *dirms*, and in the second to the third of the value of the goat; because the heirs and the legatee having had proportionate claims to the whole in an indefinite manner, are to participate in the loss according to the proportion of their claims;—in the same manner as holds where the effects are of different kinds, such as a gown, a slave, and a house; for if “*one of these three*” be bequeathed to a particular person in an indefinite manner, and two of them be afterwards destroyed, the remaining one is divided between the heirs and the legatee; and so likewise in the present instance. Our doctors, on the other hand, argue that it is possible completely to maintain the right of one of two partners (such as the *legatee*, in the present instance) in one of three articles, where they are all of the same class; (whence it is that the holder of a partnership property may be compelled, if it be of a homogeneous nature, to make a division of it among the partners; the division, with respect to any unique and specific article, being the right of each partner respectively; )—and as the bequest precedes the right of the heirs \*, the right of the legatee is therefore completely maintained with respect to the thousand *dirms* in question;—the case being in fact the same as where a person bequeaths another three *dirms*, two of which are afterwards lost,—when the remaining *dirm* goes completely to the legatee, according to all our doctors. It is otherwise where the effects bequeathed are of different kinds; for there, after the loss or destruction of two of the articles, neither the complete

two thirds of it be lost, and the remainder come within a third of the testator's estate, the legatee is entitled to the whole of such remainder.

\* The debts and bequests due from an estate are discharged previous to the distribution of the portions of inheritance.

right of the whole, nor the complete particular right of any one of the parties, can be maintained by means of the remaining article; and therefore the division is not set aside in favour of the legatee on account of the priority of his claim; on the contrary, the remaining article is divided among the parties, according to the nature of their respective claims.

A bequest of "the third" of an article, part of which is afterwards destroyed, holds with respect to a third of the remainder.

If a person bequeath to another "*a third of his clothing*," of which two thirds are afterwards destroyed, and the remaining third exceed in value a third of the whole property of the testator, the legatee is in that case entitled to only one third of the vestments that remain. Lawyers, however, have observed that this is only where the vestments are of different kinds; for otherwise they are considered in the same light as *dirms*;—and so likewise of all articles of weight, or measurement of capacity, as it is possible, in those also, to maintain complete the right of particular partners to particular portions,—whence it is that a division of such among partners may be compelled.

If a person bequeath to another "*the third of his three slaves*," and two of them afterwards die, the legatee is entitled only to a third of the value of the remaining slave; and the same rule also holds with respect to different houses. Some say that this is according to *Haneefa* only; and others, that it is the opinion of all our doctors. The compiler of the *Hedaya* remarks that it is approved, proceeding upon the general rule before stated, that "in all articles which admit of the rights of the partners being united in them, it is practicable to unite the right of the legatee."

A legacy of money must be paid in full with the property in hand, although all

If a person whose estate consists, partly of ready money, and partly of debts due to him from others, bequeath to another one thousand *dirms*, and that sum exceed not a third of the *existant* property, it is paid to the legatee without any deduction. If, on the contrary, it exceed

exceed a third of the ready property, he is only to receive a third of the amount in hand; and afterwards a third must be paid him, of whatever sums may occasionally be recovered by the heirs, until in this manner the amount of the legacy be completely discharged. The reason of this is that the legatee is (as it were) a partner with the heirs; and therefore, if his claim in particular were discharged with the ready property (by its being applied to the payment of the whole of his legacy,) an injury would be occasioned to the right of the heirs, as ready money is allowed to be preferable to money that is due.

the rest of the estate should be expended in debts.

If a person leave a third of his property "*to ZEYD and OMAR,*" and *Omar* be at that time dead, the whole of the third is given to *Zeyd*, whether the testator, at the time of making the will, have been acquainted with the death of *Omar* or not; for as a defunct is not capable of becoming a legatee, he therefore cannot prevent a living person from being so;—in the same manner as where, for instance, a person bequeaths something "*to ZEYD and to a WALL.*" According to one tradition from *Abou Yoozaf* it is said, that if the testator were not acquainted with the death of *Omar*, *Zeyd* is then entitled only to one half of the third; for on such a supposition the will in favour of *Omar* was valid in the opinion of the testator; which sufficiently indicates his will and intention to have been that *Zeyd* should receive only one half of the third. But if, on the other hand, he was acquainted with the circumstance of *Omar's* death it is evident that he intended that *Zeyd* should receive the whole, as a will in favour of a dead man is vain and useless.

A legacy left to two persons, one of them being at that time dead, goes entire to the living legatee.

If a person will that one third of his property "*be divided, as a legacy, between ZEYD and OMAR,*" and *Omar* be at that time dead, *Zeyd* is entitled to only one half of the third; for the words used by the testator clearly denote his intention that each should have an half; but *Omar* being at that time dead, the will with respect to him is void.

A legacy being bequeathed to two persons indefinitely, if one of them die, a moiety of it only goes to the other.

A bequest made by a poor man is of force if he afterwards become rich.

If a person who is poor bequeath to another “ *the third of his property*,” and afterwards become rich, the legatee is in that case entitled to a third of his estate, to whatever amount; for the bequest does not take effect until after the death of the testator; and therefore the condition of its validity is, his being possessed of property *at the time of his decease*. The LAW is also the same in case the testator, being rich at the time of making the will, should afterwards become poor, and again acquire wealth.

A bequest of any article, not existing in the possession or disposal of the testator at his decease, is null.

If a person bequeath “ *a third of his GOATS*” to another, and it happen either that he has no goats, or that such as he had were destroyed before his death, the bequest is null; for the condition of its validity is, the testator being possessed of the property *at the time of his decease*, which is not here the case. If, on the contrary, having no goats at the time of making the will, he should afterwards acquire goats, so as to leave some at his death, one third of them goes as a legacy to *Zeyd* (according to the *Rawáyet Sabeeh*;) for here the condition of validity (namely, that the testator die possessed of the property) exists.

unless it was referred to his property, in which case it must be discharged by a payment of the value.

If a person bequeath “ *a GOAT of his property*” to *Zeyd*, and afterwards die without leaving any goats, the price of a goat must in that case be paid to *Zeyd*; for the testator’s expression “ *a GOAT of his property*” denotes his intention to bequeath the *worth* of the animal. If, on the contrary, he neither bequeath “ *a goat of his property*,” nor “ *one of his goats*,” but simply “ *a goat*,” (to *Zeyd*) without any relation to his property or herd of goats, in that case there is a difference of opinion, some saying that the bequest is not valid, as the absolute expression of the testator denotes his intention to have been a legacy of the animal itself, of which he had none,—whilst others maintain it to be valid, for this reason, that the testator having specified a *goat*, of which he had none, must be supposed to have intended the *worth* of it. If, on the other hand, the words of the testator were “ *I bequeath*

"*I bequeath one of my goats,*" in that case the bequest is evidently invalid; because the relation to his herd of goats determines the legacy to have been restricted to the animal itself. (A variety of cases of this nature occur, and are determined on the principle now stated.)

If a person bequeath "*a third of his property to his Am-Walids, to the distressed, and to beggars,*" and the *Am-Walids* amount to three in all,—in that case, according to the two *Elders*, a third of his property is, after his death, divided into five shares, of which three are given equally among the *Am-Walids*, one to the distressed, and one to beggars. *Mohammed*, on the contrary, says that it is to be divided into seven shares, of which three are distributed in equal portions among the *Am-Walids*, two given to the distressed, and two to beggars\*.

Distribution of a bequest made indefinitely to three different descriptions of persons;

If a person bequeath "*a third of his property to a certain person and to the distressed,*" in that case, according to the two *Elders*, the third is divided into two equal parts, one of which is given to the person named, and the other to the distressed; whereas *Mohammed* maintains, that it must be divided into three shares, one to be given to the said person, and two to the distressed.

or, to an individual, and a particular class of people,

If a person bequeath "*a third of his property to the distressed,*" the two *Elders* are of opinion that the executor may in that case give the whole of the third to one distressed person; whereas *Mohammed* holds that it cannot be given to fewer than two.

or to a particular class of people alone.

If a person bequeath one hundred *dirms* to *Zeyd*, and one hundred to *Amroo*, and afterwards declare *Bicker* to be a participator with them,

Case of a third person being admitted.

\* The arguments are here omitted, as (in this and some following instances) they turn on certain peculiarities in the grammar of the *Arabic* language.

by



ted, by the testator, to a participation with two other legatees.

by saying "I have made thee *Bicker* a sharer with *Zeyd* and *Omar*," *Bicker* is in that case entitled to a third of each of their portions, in order that he may be put on an equality, as the words of the testator evidently imply that intention, for the term used by him [*Sbirkat*] literally means equality, which it is here possible to preserve, and there is no impracticability in the execution of the bequest. It is otherwise, where the portions of the legatees are unequal, as if the legacy of *Zeyd* were four hundred *dirms* and that of *Omar* two hundred, and *Bicker* were declared by the testator to be a sharer with them; for in that case the establishment of an equality is impracticable, and therefore *Bicker* is entitled to receive a moiety of each of their shares, that they may be brought as nearly on an equality as possible.

An acknowledgment of debt, upon a deathbed, is efficient to the extent of a third of the estate.

IF a person, on his death bed, say to his heirs, "I am indebted to *Zeyd*, and you must credit what he says," in that case the claim of *Zeyd*, to any amount not exceeding a third of the estate, must be admitted, although the heirs should falsify it. This proceeds on a favourable construction. Analogy would suggest that the declaration of *Zeyd* is not to be credited; for although an acknowledgment concerning a thing undefined be approved, still its effect depends upon the ascertainment of it; and as that cannot be had, because of the death of the acknowledger, it would follow that the declaration of *Zeyd* is of no weight. The reason, however, for a more favourable construction, in this particular, is, that the object of the acknowledger is evidently to give *Zeyd* a preference over his heirs; and it being possible to execute his design in the way of a bequest, and men being (moreover) desirous of discharging themselves of obligations where they may know of the debt itself, but are uncertain as to the amount, (as having forgotten it,) the acknowledgment is therefore considered equivalent to a bequest of which the amount is left to the determination of the legatee,—whence the matter is regarded in the same light as if the acknowledger had said to his heirs, "if *Zeyd* come and claim any thing from you on my behalf, pay him the same, to whatever amount,"

“ amount,”—which declaration would be recognized and complied with, to the amount of one third of the estate ; and the acknowledgment being thus equivalent to a bequest, the declaration of *Zeyd* must be credited to the amount of one third of the acknowledger’s estate, and no more. If, therefore, besides the acknowledgment in question, the dying person had made various bequests in favour of others, one third of his estate must be set apart for the legatees, and two thirds for the heirs, when both parties must be required “ to verify the declaration of *Zeyd* to such extent as they may think proper.” Now, if both parties acknowledge that there is something owing to *Zeyd*, it is evident that there rests a debt upon the estate affecting the shares of each respectively ; and accordingly, a deduction is made from the legatees, to the amount of one third of what they acknowledge to be owing to *Zeyd*, and from the heirs, to the amount of two thirds of what they have so acknowledged, in order that the acknowledgment of each party may be carried into execution in proportion to his right in the whole estate. If *Zeyd* should claim still more than what falls to him in virtue of this acknowledgment of the parties, each party [the heirs and legatees] must be respectively required to make oath, to the best of their knowledge, or, in other words, to this effect, that “ they do not know of any more being due to *Zeyd* ;”—for they cannot be required to swear *positively*, as their oath regards a matter between the claimant and the acknowledger merely, and in which they are not principals.

If a person bequeath any article jointly to one of his heirs and a stranger, in this case the bequest in favour of the heir is not admitted, and a moiety only of the legacy is given to the stranger ; because, as an heir possesses the capacity of being a legatee \*, he therefore ob-

A joint bequest to an heir and a stranger is executed in favour of the

\* The incapacity of an heir to succeed to a legacy does not arise from any *natural* or *original* defect in him, but is occasioned solely by the ordinance of the LAW in this particular, which suspends it upon the consent of his co-heirs.

struets

latter only,  
to the extent  
of one half;

frustrates the stranger in the title which he would otherwise have to the complete legacy. It is not so where a legacy is left between one person living and another dead, for here the whole goes to the living legatee, since as a dead person is incapable of succeeding to a bequest, there is no obstruction in this instance.

and so likewise a joint bequest to the murderer of the testator and a stranger.

If a person make a will jointly in favour of his murderer and a stranger, in that case the murderer is not entitled to any thing, and the stranger receives only a moiety of the legacy, for the reason assigned in the foregoing case, to wit, that the murderer (like an heir) possesses the capacity of being a legatee, and therefore obstructs the stranger's title to the whole, as there stated. It is otherwise where a person, on his deathbed, makes a declaration of any specific thing or sum due by him to one of his heirs and a stranger jointly; for there the declaration is invalid as well with respect to the stranger as the heir. The reason of this distinction is, that a will or bequest is an indication of endowment; and as, by it, a joint concern is established between the two legatees, the bequest is therefore valid with respect to him, of the two, who is not under a legal incapacity, namely, the stranger;—whereas a declaration or acknowledgment is an announcement of the right of the parties in whose favour it is made, referred to a past time, under the description of joint concern, a thing which cannot be established; for the establishment of it with respect to the stranger only, independent of the description of joint concern, is contrary to the tenor of the dying person's declaration; and the establishment of it (on the other hand) in the manner of joint concern, occasions the establishment of a declaration in favour of an heir, upon a deathbed, which is unlawful.

Any accident occasioning uncertainty with respect to the legatees annuls the will.

If a person bequeath three garments of different prices, leaving the best to *Zeyd*, the next in value to *Omar*, and the worst to *Blaker*, and one of these garments be afterwards lost, without its being known which of them it was, and the heirs of the testator declare, to each

legatee

legatee in particular, that "his share is lost," the bequest is null *in toto*, as it is in this case uncertain who are the legatees, and such uncertainty occasions an annulment of the will, since the *Kâzee* cannot pass a decree concerning a thing unknown. If, on the contrary, the heirs make over the two remaining garments to the legatees, the bequest is not null, but still continues in force, and those two garments are divided among them, by two thirds of the best being given to *Zeyd*, two thirds of the worst to *Bicker*, and the remaining third of each to *Omar*.

IF *Zeyd* bequeath to *Omar* a specific apartment of a house held in partnership between him and *Bicker*, it is requisite that a partition be made of the house; and then, if the apartment so bequeathed should fall within the share of *Zeyd*, it must be given to *Omar* as his legacy, according to the two *Elders*; whereas, according to *Mohammed*, he is entitled only to one half of it. If, on the other hand, the apartment so bequeathed should not fall within the share of *Zeyd*, then, according to the two *Elders*, a number of cubits equal to the size of the bequeathed apartment must be given to *Omar* from the share of *Zeyd*, whereas, according to *Mohammed*, he is entitled only to *half* that number. The argument of *Mohammed* is that in this case the testator has bequeathed partly his own property, and partly the property of another, inasmuch as the house was shared equally between him and *Bicker* in all its parts. The bequest, therefore, takes effect with respect to the former, but remains suspended with respect to the latter; and if, upon the partition, (which is a species of exchange) the apartment fall within the share of *Zeyd*, still that part of the bequest which had remained suspended does not take effect, any more than where a person bequeaths to another some article which does not belong to him, and afterwards purchases that article. Where, moreover, upon a partition of the house, the apartment in question falls to the share of the testator, his bequest takes effect with respect to the actual legacy,

Bequest of an apartment in a partnership house.

namely, an half of the apartment; whereas if, on the contrary, it fall to the lot of *Bicker*, *Amroo* (the legatee) is to receive from the share of *Zeyd*, a number of yards equivalent to half the apartment; because, upon the actual legacy failing the bequest must be executed by means of the consideration received in exchange for it; in the same manner as where a person bequeaths a slave who is afterwards killed; in which case the legacy must be executed from the compensation received for his blood: (contrary to where the slave is *fold*; for in this case the bequest has no connexion with the price received, but is completely annulled by the sale; whereas a bequest is not annulled by a partition, as that is also a species of *separation* of property.)—The argument of the two *Elders* is, that the testator has certainly meant to bequeath an article in which his property may be firmly and solidly established by means of partition; for his apparent object is to bequeath an article which in every respect may be productive of use; and that can be accomplished only by *partition*, as the use of a thing of which the property is shared in common with another is defective.—Where, therefore, the apartment bequeathed, upon a partition being made, falls to the share of *Zeyd*, and his property in it is firmly established *in toto*, his bequest of it takes complete effect. With respect to what is urged by *Mohammed*, that “partition is a sort of *exchange*,” it may be replied that the quality of *exchange*, in partition, is merely secondary, the original design of partition being, that each may enjoy the complete use of his own share, (whence it is that the parties may be *compelled* to a partition of it;) according to which original design the apartment may be said to have been in the possession of *Zeyd* from the beginning. Where, on the other hand, it falls to the share of *Bicker*, in that case the bequest of *Zeyd* takes effect from the share allotted to him, to the quantity of cubits of the whole apartment; because that quantity is the consideration for the apartment, as has been already stated;—or, because the bequest must be thus construed, that the testator, by the *apartment*, merely meant a sum of measurement equivalent thereto, in order that his design may

may be answered as far as the nature of the case admits\*;—or else, because the testator may have meant that the apartment should go to *Omar*, provided it fell to his share upon a partition, or otherwise a sum of measurement equivalent to it;—this case being analogous to that of a man suspending the freedom of a child born of his female slave, and the divorce of his wife, upon the circumstance of his female slave bearing the child, (by saying, “upon my female slave being delivered of her first-born child, such child is free and my wife divorced;”) which is construed to mean *any* child, to produce the divorce, and a *living* child to produce the emancipation.—† It is to be observed that where the apartment does not fall to the share of *Zeyd*, if the extent of the whole house be one hundred cubits, and that of the apartment ten, *Mahammed* in that case is of opinion that the share of *Zeyd* is to be divided into ten parts, of which nine must be given to the heirs, and one to *Omar*;—whereas the two *Elders* hold that the share of *Zeyd* is to be divided into five parts, of which one must be given to *Omar*, and four to the testator’s heirs. (With respect to what is mentioned in the *Hedaya*, that [according to the two *Elders*] “the share of the testator is divided into eleven parts, of which two are given to *Omar* and nine to the heirs,” it is a mistake, for this mode of division obtains only in cases of *declaration* or *acknowledgment*.) It is here proper to remark that if an *acknowledgment* be made under the same circumstances as are here stated, as if *Zeyd* should declare an apartment of

\* An objection and reply are here stated, which the translator prefers inserting in a note in order to avoid an interruption of the context.

“OBJECTION.—If such be the testator’s meaning, why is the particular apartment given to *Omar* when it falls to the share of *Zeyd*?”

“REPLY.—The apartment in question is made the legacy, where it falls to the share of *Zeyd*, for this reason, that in thus settling the matter a regard is paid to the two chief distinguishing circumstances of the case, namely, the quantity or sum [of the thing bequeathed,] and the investiture [of the legatee] with the actual apartment:—and as, where the apartment falls to the lot of *Bicker*, it is impossible to pay attention to *both* circumstances, it accordingly in that case suffices to pay attention to the first.”

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the extent of ten cubits, in a house of one hundred cubits, which he possessed in common with another, to be the property of *Omar*, some say that in this case also a difference of opinion obtains between the two *Elders* and *Mohammed*; whilst others maintain that there is no difference of doctrine in this point, *Mohammed* also holding (in common with the two *Elders*) that in case the said apartment fall to the share of *Zeyd*, it goes complete to the acknowledgee [the person in whose favour the acknowledgment is made,] or otherwise, that the share of the acknowledgee is divided into eleven parts, of which two are given to the acknowledgee and nine to the acknowledger. The reason of this last adjustment is that the acknowledger here makes his acknowledgment to this purpose; "the house which, exclusive of that apartment, measures  
 " ninety cubits, is the joint property of me and my partner,—of which  
 " forty-five appertain to me;" and the acknowledgee claims ten cubits from the fifty which fall to the share of the acknowledger. The fifty cubits therefore, which constitute a moiety of the house, are divided between the acknowledger and acknowledgee in this way, that the acknowledgee takes in the proportion of ten cubits, and the acknowledger in the proportion of forty-five, and accordingly that moiety of the house is disposed of in eleven shares. It is otherwise with respect to a bequest, as before stated; for there this mode of division cannot obtain, as the testator, in making his bequest, cannot be supposed to have said  
 " this house, except such an apartment, is in common between me  
 " and my partner," since if he were to speak thus his bequest would be null, as the bequest of another's property is not approved. *Mohammed* further remarks that the difference between a bequest and an acknowledgment is this, that an acknowledgment affecting the property of another is approved, (inasmuch that if a person were to declare that "such a thing, held by *Zeyd*, is the property of *Amroo*," and this person should at any time thereafter become proprietor of that thing, he is directed to deliver it up to *Amroo*,) whereas a bequest of the property of another is utterly null and void, inasmuch that if a person bequeath any thing belonging to another, and afterwards become

come proprietor of that thing, and die, still the bequest is of no effect\*.

If a person bequeath a thousand *dirms* that belong to another, the execution of the bequest rests entirely on the consent of the proprietor, and it is optional in him to confirm it, or not, as he pleases. If he, therefore, after the death of the testator, give his consent, the bequest is valid, and the money paid to the legatee accordingly. This consent, however, is purely voluntary and gratuitous; whence if, after having signified it, the person refuse to pay the money, it is lawful.

The validity of a bequest of money belonging to another rests upon the proprietor's consent.

If two sons make a partition of their father's estate, and one of them then declare that "his father had bequeathed a third of his property to *Zeyd*," he [the declarer] must in that case make over a third

An heir, after partition of the estate, acknowledging a bequest in

\* There being here a considerable deviation from the original text, and also some confusion in the subject, (owing to the quantity of extraneous matter introduced by the *Persian* commentators,) the translator thinks it his duty to give the whole passage literally, from † to \*, as stated in the *Arabic* copy.—"Where the apartment falls to the other partner, not the testator, the house measuring one hundred cubits, and the apartment ten cubits, the testator's share is divided into ten lots, nine for the heirs, and one for the legatee.—This is according to *Mohammed*; for he supposes the legatee to multiply a moiety of the apartment by five, (the number of cubits it measures,) and the heirs the half of the remainder of the house by forty-five; and thus the whole will compose five lots [of ten cubits,] which makes ten [lots of five cubits.]—But according to the two [*Elders*] it is divided into eleven lots; because they suppose the legatee to multiply by ten, and the heirs by forty-five; and thus the whole composes eleven lots, two for the legatee, and nine for the heirs.—If declaration [*acknowledgment*] be put in the place of bequest, it is said there is a difference of opinion:—but it is also said that there is no difference on the part of *Mohammed*,—the only difference, according to him, being that an acknowledgment affecting the property of another is valid,—inasmuch that he who makes an acknowledgment concerning property possessed by another in favour of a different person, and afterwards obtains possession of the same, must be directed to give it up to the acknowledgee;—whereas a bequest affecting the property of another is null; inasmuch that if the testator should by any means afterwards become possessed of that property; and then die, still his bequest does not pass," [is of no effect.]

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favour of another, must pay the acknowledged legatee his proportion of such bequest.

of his portion to *Zeyd*. This proceeds upon a favourable construction. *Mohammed*, on the contrary, maintains that the declarer is to make over an *half* of his portion to *Zeyd*; (and such is what analogy would suggest;) because when this son made the declaration that *Zeyd* was entitled to a third, he then in fact declared *Zeyd* to be entitled to as much as himself, whence it is requisite that he make over a moiety of his portion to him, in order that both may be placed on an equality. The reason, however, for a more favourable construction in this particular is, that the son has here made a declaration, in favour of *Zeyd*, of one third, affecting the whole estate indefinitely; and as the whole estate has gone in two portions, each falling to each son respectively, it follows that the son has made his declaration in favour of *Zeyd* with respect only to a *third* of his own portion.

Bequest of a female slave who (previous to the partition of the estate) produces a child.

IF a person bequeath a particular female slave to *Zeyd*, and after his death the said slave bring forth a child, the legatee is in that case entitled to both the mother and child, provided, however, that their added value do not exceed a third of the estate, for then *Zeyd* is to receive the female slave, as far as a third of the estate, and if her value be short of the third, the residue must be made up to him from the value of the child. This is according to *Haneefa*. The two disciples, on the contrary, maintain that in this case the legatee is to receive to the amount of a third of the property from both the mother and child, in proportion to their respective values. Thus if the value of the mother be three hundred *dirms*, that of the child the same, and the other effects amount to six hundred *dirms*, the whole forms an estate of one thousand two hundred *dirms*, of which a third is four hundred. Now *Haneefa* holds that, in this case the female slave must be made over to the legatee in payment of three hundred *dirms*, and he also receives one hundred deducted from the value of the child;—whereas the two disciples maintain that he is entitled to a deduction of two thirds from the value of each. The argument of the two disciples is, that the child is virtually included in the bequest, from its being (as it were) a dependant

on the original subject of it, and that therefore the bequest must be executed proportionally from both, without preference or distinction.—The argument of *Hamefa* is, that the mother is the original subject of the bequest, and the child only a dependant; and the dependant cannot obstruct the original. If, moreover, the bequest were executed equally from both, it induces this consequence, that a part of the legacy is split off from the original subject, which is unlawful. All that is here advanced proceeds on a supposition of the birth of the child happening prior to the partition, and the acceptance of the legatee; for if it should take place afterwards, the child incontestibly belongs to him, as being the offspring of his property; for his right in the slave was fully and completely established by the partition.

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## SECTION.

### *Of the Period of making Wills.*

It is to be observed, as a general rule, that where a person performs, with his property, any gratuitous deed, of immediate operation, (that is, not restricted to his death,) if he be in health at the time, such deed is valid to the extent of all his property,—or, if he be sick\*, it takes effect to the extent of one third of his property; and where a person performs such deed, with his property, restricted

Gratuitous acts, of immediate operation, if executed upon a deathbed, take effect to the extent of one third of

\*. Arab. *Mawez*.—This term (as has been already observed) literally means sick. In the language of the LAW, however, it is always used to signify a *dying* person,—that is, “sick of a mortal illness;” and in that sense it is invariably to be understood throughout this book.

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to the circumstance of his decease, it takes effect to the extent of a third of his property, whether, at the time, he be sick or in health. If, on the contrary, a person make an acknowledgment of debt, such acknowledgment is of effect to the whole extent of his property, notwithstanding it be made during sickness, as this is not a *gratuitous* deed. Still, however, a declaration of this nature, made in health, precedes a declaration of the same nature made in sickness. It is also to be remarked, that a sickness of which a person afterwards recovers is considered, in LAW, as health \*.

An acknowledgment on a deathbed is valid in favour of a person who afterwards becomes an heir; but not a bequest or gift.

IF a sick person make an acknowledgment of debt in favour of a strange woman, or make a bequest in her favour, or bestow a gift upon her, and afterwards marry her, and then die, the acknowledgment is valid; but the bequest or gift is void; for the nullity of an acknowledgment in favour of an heir depends on the person having been an heir at the time of making it, whereas the nullity of a bequest in favour of an heir depends on the legatee being so at the time of the testator's death, as has been already explained; and as the woman was not an heir at the time of the acknowledgment, but had become so [by marriage] at the time of the testator's death, the acknowledgment is therefore valid, but the bequest is void; and so likewise the gift, it being subject to the same rule as the bequest.

neither is an acknowledgment so made valid, if the principle of inheritance had existed in the person previous to the deed.

IF a sick person make an acknowledgment of debt due by him to his son, or make a bequest in his favour, or bestow a gift upon him, at a time when the son was a Christian, and he [the son] afterwards, previous to his father's death, become a *Muselman*, all those deeds of acknowledgment, gift, or bequest, are void: the bequest, and the gift, because of the son being an heir at the death of his father, as above explained; and the acknowledgment, because, although the

\* This passage has no place in the *Arabic* copy. It has been introduced in the *Persian* version as a *premise* necessary to the completely understanding of what follows.

son, on account of the bar, (namely difference of religion,) was not an heir at the time of making it, still the *cause* of inheritance (namely consanguinity) did then exist, which throws an imputation on the father, as it ingenders a suspicion that he may have made a *false* declaration, in order to secure the descent of part of his fortune to his son. It is different in the case of marriage, as above stated; for *there* the cause of inheritance, (namely, marriage,) occurred posterior to the acknowledgment, and had no existence previous thereto; for supposing the marriage to have existed at the period of making the acknowledgment, and that the wife, being then a christian, should afterwards, before the husband's death, become a *Mussulman*, in that case it [the acknowledgment] would not be valid.

If a sick person make an acknowledgment of debt due by him to his son, who is an absolute slave or *Mokattib*,—or bestow a gift upon him, or make a bequest in his favour, and the son should afterwards, before the death of his father, obtain his liberty, in that case none of these deeds are valid, because of the reasons explained in the preceding example. It is related, in the *Mabsoot*, under the head of *Acknowledgments*, that “the acknowledgment of a sick person in favour of his son who is a slave is valid, provided the slave be not in debt; for in that case the acknowledgment is, in effect, in favour of the master, who is a stranger; and an acknowledgment in favour of a stranger is valid;—whereas, if the slave were involved in debt, his father's acknowledgment in his favour would not be valid, as in such case it could not be construed to be in favour of the master, since an indebted slave is the proprietor of his own acquisitions.”—The *bequest* is, however, invalid, because to establish it regard must be paid to the time of the testator's death, and the son is at that time an heir, as being then free. With respect, indeed, to the *gift*, it is said to be valid\*, provided the slave be not indebted; because a gift is

Such acknowledgment, gift, or bequest, in favour of a son, being a slave, who afterwards becomes free previous to the father's decease, is nevertheless void.

\* Probably meaning “in the *Mabsoot*.”

an immediate transfer and investiture; and as the son is at that period a slave, the gift is in effect in favour of his master; but if he be involved in debt the gift is invalid, as in that case he is master of his own acquisitions, and a gift is considered as such. According to the more commonly received authorities, however, the gift is void on either supposition; for as a gift during a mortal illness is equivalent to a bequest, it is therefore invalid, in the same manner as a bequest would be which was made in favour of the same person.

Rule for ascertaining a deathbed illness.

PARALYTIC, gouty, or consumptive persons, where their disorder has continued for a length of time, and they are in no immediate danger of death, do not fall under the description of sick. [Mortis,] whence deeds of gift, executed by such, take effect to the extent of their whole property; because, when a long time has elapsed, the patient has become familiarized to his disease, which is not then accounted as *sickness*. (The length of time requisite, by its lapse, to do away the idea of *sickness* in those cases is determined at one year; and if after that time the invalid should become bedridden, he is then accounted as one recently sick.) If, therefore, any of the sick persons thus described make a gift in the beginning of their illness, or after they are bedridden, such gift takes effect from the third of their property, because at such a time there is apprehension of death, (where medicine is then administered to them,) and therefore the disorder is then considered as a *deathbed illness*.

CHAP.

## CHAP. III.

## Of Emancipation upon a Deathbed; and of Wills relative to Emancipation.

It is a person, on his deathbed, emancipate a slave, or give a portion of his property to another, or make a *Mohabât*\*, in purchase or sale, by buying an article at an over-value, or selling it at an under-value, or concerning the dower, hire, or so forth,—or become security for another, all these deeds are considered in the light of a bequest, and take effect to the extent of a third of his estate.

Emancipation, gift, and acts of *Mohabât*, on a deathbed, take effect to the extent of a third of the property.

If a sick [dying] person make a *Mohabât* [of any kind †], and then emancipate his slave, and [after his death] the third of his property suffice not for both, in that case *Hausefa* is of opinion that the *Mohabât* has the preference;—in other words, if, after executing the *Mohabât*, any part of the third remain, the slave is, without recompence, free in that proportion, and must perform emancipatory labour for the remainder of his value,—or for his full value, if nothing re-

Case of a *Mohabât*, and an emancipation by the same person.

\* *Mohabât* literally signifies *connivance*.—Thus, a purchaser or seller who gives more, or takes less, for an article than its real value, *connives* at the loss.—This term, therefore, is not confined to sale, but extends to every act in which the person connives at his own loss, such as (in the case of dower) paying the wife more than she is entitled to, or (in a case of hire) paying the hireling more than he had agreed for.—The translator preserves the original term, as it is purely technical.—The Arabic text expresses this passage with great brevity: “Who so frees his slave in sickness, or sells, or connives, or gives, it is lawful, and recognized to the extent of a third of his property.”

† That is, “execute any contract, or perform any act, by which he sustains a wilful loss.”

mainb—If, on the contrary, the person first emancipate the slave, and then make the *Mohabât*, the slave, and the person in whose favour the *Mohabât* is made, are upon a perfect equality, and each takes from the third of the estate in proportion to his right ;—as, for instance, the slave is emancipated from the third of the estate in the proportion of his value, and performs emancipatory labour for the remainder ;—and the person in whose favour the *Mohabât* is made takes in the proportion of his *Mohabât*, and makes good the remainder.—The two disciples maintain that the emancipation has the preference in both cases, for it is the stronger, inasmuch as it does not admit of retraction. *Haneefa*, on the contrary, maintains that *Mohabât* is the stronger, as being interwoven in a compact of exchange ; contrary to emancipation, for in that there is no exchange. If, therefore, the *Mohabât* be first made, it sets aside the emancipation, because of the comparative weakness thereof ;—whereas, if the emancipation be first made, it obstructs the *Mohabât*, because of its priority, but still does not set it aside, as emancipation is incapable of setting aside a *Mohabât* ;—whence, in this instance, both are placed upon a footing. According, therefore, to this difference of opinion, if a person be possessed of two slaves, one valued at two hundred *dirms*, and the other at one hundred, and first sell the former by a *Mohabât* sale, for one hundred *dirms*, and afterwards emancipate the latter, and die, leaving no other property, in that case, according to *Haneefa*, the *Mohabât* is executed in full, and the other slave is required to perform emancipatory labour to the full amount of his value ;—whereas if, on the contrary, the emancipation precede the *Mohabât*, then a third of the value of both slaves, amounting to one hundred *dirms*, is divided equally between both parties, (that is, between the emancipated slave and the person in whose favour the *Mohabât* was made ;) and accordingly, a moiety of the slave is emancipated without any consideration, and he is to perform emancipatory labour for fifty *dirms* more, being the remaining half of his value ;—and fifty *dirms* are deducted, in the

the manner of a *Mohabât*, from the slave sold by *Mohabât*, and his price is then one hundred and fifty *dirms*, for which the purchaser is accountable;—but the two disciples maintain that the slave is completely free in both instances. In the same manner, if a person, upon his deathbed, first sell a slave by *Mohabât*, then emancipate a second, and afterwards sell a third by *Mohabât*, and have no other property besides these three slaves; in that case, according to *Hanefi*, the half of the third of the property must be allowed to the person in whose favour the first *Mohabât* was made, and the remaining half of the third is equally divided between the emancipated slave and the one in whose favour the last *Mohabât* was made;—whereas, had he first emancipated one, then sold the second by *Mohabât*, and afterwards emancipated the third, in that case one third of the estate would be divided into two equal shares, of which one would be given to the person in whose favour the *Mohabât* sale was made, and the other equally divided between the two emancipated slaves:—but the two disciples maintain that in both cases the emancipation is to be preferred.

It is to be observed, as a standing rule\*, that where a person bequeaths several legacies, and the third of his property suffices for the payment of the whole, they are all carried into execution without a preference being given to either. But if, besides these legacies, he should in his last illness emancipate a slave, or direct the emancipation to take place after his death, or sell something by *Mohabât*,—in that case both kinds of emancipation, as well as the *Mohabât*, are preferred to the legacies, and must therefore be first executed from the third of the estate, and the remainder (if there be any) is then divided equally among the legatees.

*Mohabât* or emancipation precedes, in their execution, the actual bequests.

\* Arab. *Asâ*; literally, a root; meaning (in this place) a principle or ground of decision in all parallel cases.



The appropriation of a sum, by bequest, to the emancipation of a slave is annulled by the subsequent loss or failure of any part of it; but not the appropriation of a sum as the performance of a pilgrimage.

If a person, on his deathbed, set aside one hundred *dirms*, and will that "after his death the said sum be applied to the emancipation of a slave," and one *dirm* of the number happen to be lost, in that case *Haneefa* maintains that the will is annulled, and that the remaining ninety-nine *dirms* cannot be applied to the purpose of emancipating a slave. If, on the contrary, the person will that "the said sum be appropriated to defray the expence of a pilgrimage to *Mecca*," in that case the loss or destruction of one *dirm* does not invalidate the will, but the remaining ninety-nine *dirms* are applied to the purpose prescribed by the testator, by deputing a person from such a distance as may enable him to reach *Mecca* by means of the said sum. (If also, in this last case, part of the sum have been lost or destroyed, and there remain a part after the return of the pilgrim, it must be restored to the heirs.) The two disciples maintain that the will is valid in the former instance likewise, and the ninety-nine *dirms*, applied to the emancipation of a slave, in the same manner as (in the other instance) to the performance of the pilgrimage. The argument of *Haneefa* is that, in the former instance, the will directs the emancipation of a slave valued at one hundred *dirms*; and therefore, if it were executed with ninety-nine *dirms*, it would take effect in favour of a person different from the intended legatee, which is not lawful. It is otherwise with a bequest concerning pilgrimage, as pilgrimage is purely a religious duty, and religious duties appertain exclusively to God; and as God therefore is the legatee in this instance, a diminution of the sum does not induce an execution of the will in favour of any other than the legatee, since a pilgrimage for ninety-nine *dirms* is performed on behalf of God, as much as a pilgrimage for one hundred *dirms*. Some have observed that this difference of opinion between *Haneefa* and the two disciples is founded on the different sentiments they entertain with respect to the emancipation of a slave; the two disciples holding it to be a religious act, in the same manner as the performance of a pilgrimage; and *Haneefa* considering it as an act in favour of the slave alone.

(The compiler of the *Hedaya* remarks that this last opinion is approved.)

If a person during his last illness emancipate a slave valued at one hundred *dinms*, and die, leaving two sons and one hundred *dinms*, and the emancipated slave and his heirs give their consent to the emancipation, the slave is not required to perform any emancipatory service whatever, but is free without so doing; for although the manumission was equivalent to a bequest in the proportion beyond a third of the emancipator's property, yet it is valid on the heirs assenting to it.

A slave exceeding a third of the property, emancipated on a death-bed, is exempted from emancipatory labour by the heirs assenting to his freedom.

If a person will that "his heirs emancipate his slave at his decease," and the slave, after the death of the testator, commit an offence, and the heirs surrender him, as a compensation, to the avenger of offence, the will is void; because the surrender of him in compensation for the offence is approved; for as the right of the testator must yield to that of the avenger of offence, the right of the legatee must consequently yield to it likewise, since a legatee obtains his right in the legacy from the testator; and as, upon the slave being surrendered in compensation for the offence, he passes out of the property of the testator, the will is void of course. If, on the contrary, the heirs prefer paying a redemptionary atonement, the will remains valid, and does not become void; (but in this case the redemptionary atonement falls entirely upon their property, as they have themselves undertaken the payment of it;) and as the slave, by the payment of the redemption, is purified from the offence, the case is therefore the same as if he had not offended at all, and the will takes effect of course.

A bequest of emancipation, in favour of a slave, is annulled by his being made over in compensation for an offence committed by him.

If a person bequeath to another "a third of his property," and leave, among his other effects, a slave, and the legatee and heirs agree that the testator had emancipated the slave, but differ with respect

Where the heir and the legatee agree concerning a slave having

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been emancipated by the testator, the allegation of the heir is credited with respect to the date of the deed.

spect to the *time* of such emancipation, (the legatee asserting that it was during his health, and the heirs, on the other hand, maintaining that it was during his sickness,) in that case the word of the heirs must be credited, and the legatee is entitled only to what remains after the value of the slave is deducted from the third of the testator's whole property; because the legatee here pleads his title to a third of what remains after the emancipation of the slave, since manumission granted during health does not stand as a bequest, (whence it is that it takes effect from the *whole* of the property,) and the heirs resist his plea, asserting that the testator had emancipated the slave during sickness; and as manumission during sickness is a species of bequest, and takes place of a bequest of a third of the property, the heirs are therefore *negators*; and as the assertion of a negator [the defendant,] upon oath, must be credited, the legatee is therefore entitled to nothing whatever; — unless there should remain some excess in the third of the property over and above the value of the slave, in which case the legatee is entitled to such excess; or, unless the legatee confirm his assertion by evidences, in which case he is entitled to a third of what remains of the whole estate after the emancipation of the slave.

Case of an alleged emancipation and debt, credited by the heirs.

IF a person die, leaving no other property except one slave, and the slave say to the heirs “ your father, whilst he was in health, “ emancipated me,” and another person say to them “ your father “ was indebted to me one hundred *dirms*,” and the heirs credit both these assertions, (as, for instance, by replying to them *together*, “ you “ both speak truly,”) the slave is, in that case, required to perform emancipatory labour to the full extent of his value, according to *Haneefa*. The two disciples, on the contrary, maintain that the slave is emancipated without performing any service whatever, because the

\* Literally, “ *is entitled to nothing whatever.*” The translator renders the passage in a *modified* sense, because of the reservation afterwards stated.

proof of the debt and of the emancipation during health are established, jointly, as the heirs have acknowledged both at the same time, and the emancipation of a slave during health does not induce the necessity of labour notwithstanding the emancipator should be involved in debt.

The argument of *Haneefa* is, that the acknowledgment of the debt on the part of the heirs is stronger than that of the emancipation; because the former is valid at whatever period it may have been contracted, and is dischargable from the whole estate; whereas the latter, if performed during sickness, is limited to a *third* of the estate; and such being the case, it would follow that the emancipation is utterly annulled. As, however, emancipation, after having been made, does not admit of being *absolutely* annulled, it is therefore *virtually* annulled, in this instance, by the imposition of emancipatory labour.—

The same difference of opinion subsists in the case where a person, dying, leaves one thousand *dirms*, and one person asserts that the deceased owed him one thousand *dirms*, and another, that he had deposited one thousand *dirms* in trust with the deceased, and the heirs confirm both assertions at one and the same time; for in such case the two disciples are of opinion that both claims are upon an equal footing, and that the one thousand *dirms* are therefore to be divided equally between the parties; whereas *Haneefa* maintains that the claim of the depositor is the strongest, as his right relates to the identical *dirms*, whilst the creditor has only a general claim on the person.

## SECTION.

*Of Bequests for pious Purposes\*.*

In the execution of bequests to *fundry* pious purposes, the *ordained* duties precede the *voluntary*;

unless all the purposes mentioned be of equal importance, in which case the arrangement of the testator must be followed,

If a person make several bequests, for the performance of fundry religious duties, such as *pilgrimage*, *prayers*, and so forth, it is requisite to execute first such as are absolutely incumbent and ordained†; and this, whether the testator have mentioned them first or not; for the discharge of the *ordained* duties is of more importance than that of acts which are merely voluntary; and the law therefore supposes that the object of the testator was to begin with the performance of them. But if the several duties, the objects of the will, be all of the same importance, and of similar force, and the third of the estate suffice not for the discharge of the whole, they must in that case be executed agreeably to the order in which they have been specified by the testator, as it may be inferred that those to which he gave the precedence were, in his opinion, the most urgent. *Tabacco* maintains that alms are to be executed before pilgrimage. There is also one report from *Abou Yousaf* to the same effect. Another opinion reported from him is, that pilgrimage precedes alms; and such is the opinion of *Mohammed*. The argument in favour of the first report is, that both are in an equally strong degree enjoined by God: but yet alms, as being connected with the rights of mankind, must be preferred, the right of the individual preceding the right of God.—

\* Literally, "of bequests to the rights of God."

† Arab. *Farz*: a term applied to any thing enjoined as an indispensable duty, and more particularly to the five *primary* duties; *purification*, *prayer*, *alms*, *fasting*, and *pilgrimage*.

The argument in support of the second report is, that the performance of pilgrimage, besides the expenditure of money, requires also an exertion of the body; and as this is not the case with alms, pilgrimage has therefore precedence. Either of those, however, is preferable to expiation, because they have been in a greater number of instances, and in a stronger degree enjoined by God.—Again: expiations for murder, for *Zihar*, and for a broken-vow, are preferable to *Sadka-fittir*, [charity given on the day of breaking fast,] because these expiations have been enjoined in the KORAN, whereas the latter has not. *Sadka-fittir*, on the other hand, is preferable to sacrifice, because it is an incumbent duty in the opinion of all our doctors, whereas a difference of opinion subsists with respect to the absolute obligation of sacrifice.

It is the execution of all pious wills, where the objects of them are not incumbent duties, (such as the erection of a mosque, of a receptacle for travellers, or of a bridge,) it is requisite to follow the arrangement of the testator, since it may be inferred that he considered those first mentioned as the most urgent. Lawyers, moreover, have remarked that if a person make several bequests, some for the performance of religious duties immediately enjoined by God, and others for benevolent purposes amongst mankind, in that case a third of his property must be set aside for the execution of them, and whatever may be the share appropriated for the performance of the duties belonging to God, it must be applied agreeably to the order of arrangement, as already explained.—It is to be observed, also, that every different duty is to be considered in the nature of a distinct legacy; for the object of each being the attainment of the goodwill of the ALL-MIGHTY, every several duty has an object in itself, and each is therefore to be considered in the nature of a legacy left to a different person.

as well as where the purposes of the bequests are purely of a voluntary nature.

Rules in be-  
quests to-  
wards the  
performance  
of a *pilgrimage*.

If a person will that "the pilgrimage incumbent on him be performed on his behalf after his death," in that case the heirs must depute a person for this purpose from the city of the testator, and furnish him with such conveyances and equipments as are suitable to his [the testator's] rank; because, being performed on his account, it must be executed in the same manner as if actually performed by himself. But if the property of the testator be inadequate to the expence of sending a person from his own city, in that case a person must be sent from some other nearer place, the distance of which from *Mecca* may be proportioned to the amount of the property.

If a person set out from his own city, with an intention of performing the pilgrimage to *Mecca*, and die on the road, after having willed that the pilgrimage be performed [by others] on his behalf, a person must be deputed for this purpose from the city of the testator, according to *Haneefa*; (and such also is the opinion of *Ziffer*.) The two disciples, on the contrary, maintain that a person is to be sent from the place at which the testator had arrived in the prosecution of his intention;—and the same difference of opinion obtains where a person, having undertaken the pilgrimage on account of another, dies in the like manner on the road. The reasoning of the two disciples is, that the performance of a part of the journey, with the intention of having prosecuted the remainder, is in itself an act of piety, which is entitled to merit with God, and which annuls, in a proportionate degree, the obligation of the duty. Hence the pilgrimage is to be recommenced from the place in which he died, and which in effect has become (as it were) his city. It is otherwise where a person, with a view of trading, sets out on a journey to *Mecca*, and dies on the way, after having willed that the pilgrimage be performed on his behalf; for in this case the part of the journey already performed not being an act of piety, there is an evident necessity for sending a person from the city of the testator.—The reasoning of *Haneefa* is, that

that the will must be construed as meaning a commencement from the city of the testator, in order that the pilgrimage may be completely performed in the manner in which it was originally incumbent on the testator.

#### CHAP. IV.

#### Of Wills in favour of Kinsmen and other Connexions.

If a person make a bequest in favour of "his *neighbour*," this, according to *Haneefa*, is a bequest to the person whose house is immediately adjoining to that of the testator. The two disciples, on the contrary, maintain that it comprehends all the inhabitants of the vicinity, who belong to the same *mosque*, without any regard to the immediate adjunction of the houses; since, according to the common acceptance of the word, they all fall equally under the description of *neighbours*. The arguments adduced by *Haneefa* in support of his opinion upon this point are twofold.—FIRST, the person whose house adjoins to that of the testator is in reality the *neighbour*.—SECONDLY, the modes and descriptions of *neighbourhood* are many; and as it would be impracticable to carry the will into execution with respect to the *whole*, it is therefore necessary to restrict it to him whose title, from

A bequest to "a neighbour" is in favour of the owner of the next adjoining house;

\* Specifying the legatee by *description* only, without mentioning his name; as thus, "I bequeath one thousand DIRMS to MY NEIGHBOUR."—In this and the succeeding examples, the effect turns entirely on the terms in which the testator signifies his bequest.

the



and compre-  
hends all  
competent  
descriptions  
of persons.

the circumstance of adjunction, is the most perfect and indisputable. It is to be observed, that the learned in the law are of opinion that every person may be included under this description of neighbour, whether the proprietor of a house or not, or, whether a man or a woman, a *Myssulman* or a *Zimnee*, the term *neighbour* being equally applicable to all these. *Haneefa* also holds that an absolute slave, possessed of a house in the neighbourhood, is entitled to the benefit of the will.—The two disciples hold a different opinion; because, in such case, the benefit of the will would ultimately revert to the master of the slave, who is not supposed to be a neighbour. The argument of *Haneefa* is, that the term *neighbour* applies indiscriminately to all.

Rules in be-  
quests to  
“the *As’bār*”  
of the testa-  
tor;

If a person make a bequest in favour of “his *As’bār*,” all the relations of his wife within the prohibited degrees (such as her father, brother, and so forth) are therein included; and likewise all the relations of his father’s wife [his step-mother] and of his son’s wife [his daughter-in-law] within the prohibited degrees, as these all stand in the relation of *As’bār* to the testator. This explanation of *As’bār* has been followed by *Mahammed* and *Abou Obeydah*. It is to be observed that all the kindred of the wife within the prohibited degrees are included in the bequest, notwithstanding she were, at the time of the death of the testator, in her *edit* from a reversible divorce. But if the divorce was irreversible, her relations are not to be included, as the existence of that degree of relation entitled *As’bār* depends on the actual existence of the marriage at the time of the testator’s death; and by an irreversible divorce marriage is utterly annulled.

and to “his  
“*Kbatn*,”

If a man make a bequest in favour of “his *Kbatn*,” it is a bequest to the husbands of his female relations within the prohibited degrees;

\* *As’bār* is the plural of *Sehr*, (pronounced, in *Arabia*, *Dehr*,) which is a general term for all relations by marriage.

and

and in it are likewise included all the relations of these husbands within the prohibited degrees, these also falling under the description of *Khatn*.—(Some commentators remark, that this explanation is agreeable to the ancient custom; but that in the present times *Khatn* comprehends only the husbands, as above.)—It is also to be observed that in this respect freemen and slaves, and the near and the distant relations are all upon a footing, because the term *Khatn* comprehends the whole of these.

If a person make a will in favour of his "relations" [*Akrabá* \*], it is executed in favour of the nearest of kin within the prohibited degrees, and failing of them, in favour of the next in proximity, and so on with respect to the rest within the prohibited degrees, in regular succession. The will, in this case, includes two or more; but the father, mother, or children of the testator are not comprehended in it. This is the opinion of *Hanefá*. According to the two disciples, the will includes only such as are descended from the most distant progenitor of the testator, professing the *Mussulman* faith.—(Concerning the meaning of "the most distant progenitor professing the faith," there is a difference of opinion; some maintaining that this applies to the remotest ancestor who actually embraced the faith, and others alleging that it extends to the remotest ancestor who may have known of the existence of the faith, although he himself may not have acceded to it; as is exemplified in the case of *Abou Tább*, who, although he understood the *Mussulman* faith, never embraced it.) The argument of the two disciples is, that the term *relations* being in general applied to all of the *same blood*, the will therefore extends to all such as fall under this description, to whatever degree removed. The arguments of *Hanefá* are that legacies are a species of inheritance; and as, in inheritance, the arrangement here described is observed with

and to his  
*Akrabá*;

\* *Akrabá* is the plural of *Kareeb*, and signifies (collectively) *kindred*.

respect

respect to the heirs, it is also observed in the payment of legacies.—As, moreover, the plural term [*Akrabá*] mentioned in inheritance means *two*, so likewise in bequest \*.—Besides, the object of the testator, in his bequest, is, to compensate for his deficiencies, during life, with respect to the *ties of kindred*†, which affects only his relations within the prohibited degrees. The parents or children, moreover, are not styled relations, [*Akrabá*,] inasmuch that if a person were to call his father “*his* RELATION,” [*Kareeb*,] he would be considered as denying his parentage. The reason of this is that, in common usage, by the term relation [*Kareeb*] is understood one related to a person by means of another: but the relation of parent and child is personal, and not by means of another.—In short, according to *Haneefa*, the will in question is restricted, in its operation, to the prohibited relations of the testator; whereas, according to the two disciples, it extends to [all the descendants of] the most distant progenitor professing the faith;—whilst *Shafei* maintains that it is confined solely to the testator’s father [and his offspring.]

If a person, having two paternal and two maternal uncles, make a will in favour of “his relations,” [*Akrabá*,] it is in favour of the *paternal* uncles only, according to *Haneefa*, he holding that regard is to be paid to the order of relationship;—whereas, according to the two disciples, all the four uncles are included, they holding that no regard is to be paid to the order of relationship. If, on the other hand, the testator have only one paternal and two maternal uncles, the half of the legacy, in that case, goes to the paternal uncle, and the other half to the two maternal uncles, out of attention to the

\* Here is something like a contradiction; for it was before said that “the will includes *two or more*.” This, however, is not to be taken as excluding any number *above* two, but merely as comprehending the *dual* as well as any higher number.

† Arab. *Sillá Ribm*.—It is a technical term, comprehending, in its application, the kindred *within the prohibited degrees only*.

plural

plural number, which, in bequests, comprehends *two*, (as before observed;) for as, if there were *two* paternal uncles, the whole legacy would go to them, it follows that where there is *one* only, he gets no more than an half, and the other half goes to the two maternal uncles. It would be otherwise if the person had expressed his bequest for "his *kinsman* \*"; for in this case the whole legacy would go to the paternal uncle, and nothing whatever to the two maternal uncles; because, as the term *kinsman* expresses a *singular*, not a *plural* number, the paternal uncle therefore takes the whole, he being next of kin.—If (in the case of a bequest to "*relations*") the testator have a paternal uncle only, [and no maternal uncles,] he is entitled to no more than a moiety of the third of the estate; for as, if there had been *two* paternal uncles, they would have had the whole between them, one consequently gets only an half.—If, on the contrary, he have a paternal uncle and aunt, and a maternal uncle and aunt, the legacy goes in equal shares between the paternal uncle and aunt, both being related to the testator within an equal degree of affinity,—and their connexion being of a stronger nature than that of the *maternal* uncle or aunt.—A paternal aunt, moreover, although she be not entitled to inherit, is nevertheless capable of succeeding to a legacy,—in the same manner as holds with respect to a relation who is a *slave* or an *infidel*.—It is to be observed that, in all these cases, if the testator have no prohibited relation, the bequest is null, because it is restricted, in its operation, to those within the prohibited degrees, as before noticed.

If a person make a bequest "to the *Abl*† of such an one," it is a bequest to the wife of the person mentioned, according to *Haneefa*. or to the *Abl* of a particular person,

\* Arab. *Zee-Kirrâbit*.

† The word *Abl*, in its most common acceptation, denotes a *people* or *family*, as *Abl Iran*, "the people of *Persia*,"—*Abl-nee*, "my family."—(This and several succeeding examples turn entirely upon the meaning of the terms used by the testator.)

The two disciples, on the contrary, maintain that the bequest comprehends every individual of the family, entitled to maintenance from that person, such being (with them) the common import of the word. The argument of *Haneefa* is that *Abl*, in its literal sense, signifies a wife, a proof of which is drawn from this sentence of the KORAN, “*Moses WALKED WITH HIS Abl*,” [wife,] (whence also the common mode of expression “such a person made *tādabul* [married] in a “particular city;”)—and as the word *Abl*, in its literal sense, means a wife, it follows that whenever it is used absolutely it must be resolved into its *literal* sense, which is the *true* one.

(or of the  
house of a  
particular  
person;)

If a person make a bequest “to the *Abl* of the house of such an “one,” the father and grandfather of the person named are included in such bequest, as well as all the descendants from the remotest progenitor, on the paternal side, professing the *Mussulman* faith;—and if a person make a bequest “to the *Al* of such an one,” it is a bequest “to the *Abl* of his house,” the term *Al* applying to the tribe from which he is descended.

If a person make a bequest “to the *Abl* of such a person’s *Niṣṣ* “[race] or *ḡins*” [generation,]—by the former is understood all those descended from his ancestors in general,—but by the latter those only descended from the *paternal* stock, not from the *maternal*, because men are said to be of the generation of their *fathers*, not of their *mothers*.—It is otherwise where the term *Kirrābit* [affinity] is used; for that appertains both to father and mother.

or to the or-  
phans, blind,  
lame, or wi-  
dows, of a

If a person make a bequest “to the orphans,—the blind,—the “lame,—or the widows,—of the *race* \* of such an one,”—and the individuals of the race named can be enumerated, the bequest includes

\* Arab. *Binne*. It is an irregular plural from *Ibn*, “a son,” and expresses a *generation* or *tribe*.

them all indiscriminately, whether rich or poor, males or females; for, the execution of the bequest is practicable in this instance, because of the ascertainment of the legatees.—(It is to be observed that, concerning the exposition of the expression “if they can be enumerated,” there is a difference of opinion; for, according to *Abou Yoozaf*, this phrase comprehends “as many as can be counted without the aid of written calculations,” whereas *Mohammed* holds that it extends no farther than to *one hundred*, any greater number being considered as beyond enumeration. Some, on the other hand, allege that the determination of this point rests entirely with the *Káree*, and decrees pass accordingly.)—But if the individuals of the race named be incapable of enumeration, the *poor* only are in that case included in the bequest, not the *rich*; for it [the bequest] is of a pious nature, and the object of it (namely, the goodwill of God) is best attainable by removing the wants of the poor. Besides, as the very descriptions used indicate a degree of want and distress in the legatee, it is therefore proper to admit this to have been the testator’s meaning. It is otherwise where a person makes a bequest “to the *youths* (or the “*virgins*) of a particular race,” who are innumerable; for in such case the bequest is void; because, as the description used does not indicate want, the words of the testator cannot be construed to apply to the *poor*: neither can the bequest possibly hold valid in favour of all the individuals of the class named, since, as they are not to be enumerated, it is impracticable to define them, and a bequest to unknown legatees is null,—for bequest is an act of endowment, and it is impossible to endow persons unknown. It is to be observed that, in the case of bequests “to the *poor* or *distressed*,” the legacy must be paid to at least *two* paupers, two being the smallest number of plurality in bequest, as was before stated.

particular  
race;

If a person make a bequest “to the race of such an one,” in that case, according to the two disciples, and also according to the first opinion of *Haneefa*, the women of the said race are included, the

or to the race  
of a particu-  
lar person;

X x x 2

plural

plural term *Binnee* extending to females as well as males. *Haneefa*, however, afterwards retracted this opinion, and maintained the males of the race only to be included, not the females; because the term *Binnee* applies to men *literally*, but to women only *metaphorically*; and a word must be taken in its *literal* not its *figurative* acceptation. It is otherwise where “*the race of such a person*” is the proper name of any particular tribe; for in that case the bequest includes the women also, as the term *Binnee*, in such instance, comprehends the females of the tribe along with the males,—in the same manner as the general expression *Benni-Adim* [the sons of *Adam*,]—whence the bequest includes the freedmen, the sworn confederates [*Haleefs*,] the slaves, and the *Mawalât* confederates of the tribe named.

or to the  
*awlâd* of a  
particular  
race.

If a person make a bequest “to the children [*awlâd*] of the race “of such an one,”—the males and females have an equal right in such bequest, as the term *awlâd* comprehends the whole.

A bequest to  
the heirs of a  
particular  
person is ex-  
ecuted agree-  
ably to the  
laws of in-  
heritance.

If a person make a bequest “to the *heirs* of such an one,” the legacy is in that case divided among the heirs of the person named, in the manner of an inheritance, a male getting as much as two females; because there is reason to imagine that the object of the testator, in using the word heirs, was, that the same distinction might be observed in the partition of the legacies as obtains in the case of inheritance.

Case of a be-  
quest to “the  
“*Mâwlas*”  
of the testa-  
tor.

If a person make a bequest “to his *Mâwlas* \*,” and he have some *Mâwlas* who had emancipated him, and others whom he had emancipated, the bequest is void; because the term *Mâwla* partakes of two different

\* *Mâwla* is a term applying either to the *patron* or the *client*, (see *WILLA*;) and expresses the relation between the *emancipated* and his *emancipator*. (See Vol. I. p. 425.)

meanings,

meanings, an *emancipator*, and a *freedman*, and it cannot be discovered which of these the testator intended. Neither can the intention be construed to comprehend both; because a word bearing a double meaning cannot be used in more than *one* of its senses at a time; and as it is unknown which sense the testator meant it in, the legatee is therefore uncertain; and any uncertainty concerning the legatee annuls the bequest. (In several of the books of *Shafei* it is recorded that the bequest is construed in favour of all the *Mawlas*, both the emancipators and the emancipated, as the term used applies to both.) It is to be observed that where the term *Mawla* is mentioned, in bequest, it comprehends every one whom the testator may have actually emancipated, whether in health or in sickness; but not his *Modabbirs* or *Am-Walids*, as their emancipation does not take place until after his death, and his bequest is in favour of such only as are free *previous* to that event. *Aboo Yoozaf* maintains that a *Modabbir* or *Am-Walid* is also included, because, although these be not free previous to the testator's decease, still as a *cause* of freedom has taken place, and is established in them, they may be said to have been emancipated.— In this bequest is also included any slave of the testator to whom he may have said, “you are free if I beat you not before my death;” (provided he did not afterwards beat him;) because the slave is in this case free before the testator's decease, and from the time that his strength and power of beating failed him. If the testator have *Mawlas* whom he had emancipated, and also the children of those *Mawlas*, and likewise *Mawlas* by *Mawaldt*\*, his freedmen *Mawlas* and their children are included in the bequest, but not his *Mawlas* by *Mawaldt*. It is recorded from *Aboo Yoozaf*, that those last are likewise included, and that all those three descriptions equally participate in the bequest, as the term *Mawla* comprehends the whole. *Mohammed* argues that *Mawla* is a term which partakes of two different meanings; but a word of double meaning cannot be used in more than one sense at a

\* See Vol. III. p. 437 and 448.

time;



time; and as emancipation is an absolute and unretractable act, and a contract of *Mawalât* may be rescinded at pleasure, a *Mawla* by manumission has precedence of a *Mawla* by *Mawalât*, and those are consequently included in preference. But the *Mawlas* of the testator's *Mawlas*\* are not included in the bequest, which relates only to the *Mawlas* of the testator, not to those of another. It is otherwise with the children of the testator's *Mawlas*; for they stand related to the testator because of their freedom proceeding from him. It is also otherwise where the testator has no *Mawlas* by manumission, nor children of those *Mawlas*; for in that case the *Mawlas* by *Mawalât* are included in the bequest, as the term *Mawla* applies to those by manumission, literally, and to those by *Mawalât*, metaphorically; and where the literal sense cannot be followed, the figurative sense may be adopted.

If, in the above case, the testator have only one freedman, and several freedmen of his freedman, the half of the legacy goes to the freedman, and the remaining half reverts to the testator's heirs; and there is nothing whatever for the freedmen of his freedman; for the term *Mawla* applies literally to the freedmen of the testator, and figuratively to the freedmen of those freedmen; and it is impossible that the word should be meant in two senses, as it cannot bear, at once, a *literal* and a *figurative* meaning. Neither are the freedmen of the testator's parents or children included, they not being *his* freedmen either actually or virtually.

\* That is, "the freedman of his freedmen," or "the emancipators of his emancipators."

## CHAP. V.

## Of Usufructuary Wills.

**I**F a person bequeath the service of his slave, or the use of his house, either for a definite or an indefinite period, such bequest is valid; because as an endowment with usufruct, either gratuitous or for an equivalent, is valid during life, it is consequently so after death; and also, because men have occasion to make bequests of this nature as well as bequests of actual property. So likewise, if a person bequeath the wages of his slave, or the rent of his house, for a definite or indefinite term, it is valid, for the same reason. In both cases, moreover, it is necessary to consign over the house or the slave to the legatee, provided they do not exceed the third of the property, in order that he may enjoy the wages or service of the slave, or the rent or use of the house during the term prescribed, and afterwards restore it to the heirs.—If the whole property of the testator consist of the slave or the house, in that case the slave is to be possessed one day by the legatee, and two by the heirs, alternately; but the house, on the contrary, is to be portioned into three equal parts, of which one is given to the legatee, and two to the heirs,—the legatee being entitled to one third of the estate, and the heirs to two thirds. The reason of the distinction here made between a house and a slave is, that a slave is incapable of being divided, and therefore an alternate use of him is established from necessity; whereas a house, on the contrary, is capable of division; and as division is the most fair and equitable mode, (since retaliation necessarily induces a preference of one over the other in point of time,) it ought to be adopted where it is practicable. Still, how-

ever,

An article  
bequeathed  
in usufruct

must be con-  
signed to the  
legatee;—

but if it con-  
stitute the  
*sole estate*,  
being a *slave*,  
he is possessed  
by the heirs  
and legatee  
alternately,  
or being a  
*house*, it is  
held among  
them, in their  
due propor-  
tions;

nor are the heirs (in the latter instance) allowed to sell their share.

The bequest becomes void on the death of the legatee.

ever, if the parties agree to enjoy the house by turns, it is lawful, as the right rests entirely with them:—but division is the most equitable mode.—It is not in this case lawful for the heirs to sell the two thirds of the house which are allotted to them. This is according to the *Záhir Rawáyet*. It is recorded from *Abou Yoosaf* that such sale is lawful; because these shares are purely their own property. The ground on which the *Záhir Rawáyet* proceeds is, that a right of residence may eventually be established to the legatee in the whole house, by so much other property of the testator being afterwards discovered as may cause the house to come within a third of his property. Besides, the legatee has a controlling power over the heirs with respect to their portions, so far as to restrain them from executing any deed which may injure or affect his share. If the legatee should die before the expiration of the limited term of usufruct, the article bequeathed in usufruct immediately reverts to the heirs of the testator; for the bequest was made with a view that the legatee might derive a benefit from the testator's property; but if the article were to devolve to the legatee's heirs, it induces the consequence of their being entitled to the use of the testator's property without his consent, which is contrary to law. If the legatee die during the testator's lifetime, the bequest is void; because the acceptance of it is suspended upon the death of the testator, as has been already explained.

A bequest of the produce of an article does not entitle the legatee to the personal use of the article;

If a person bequeath the *produce*\* of his house or of his slave to *Zeyd*, in that case some are of opinion that it is lawful for *Zeyd* to reside in the said house himself, or to use the slave for his own service, because an equivalent for the use is in fact the same as the use itself, so far as relates to the accomplishment of the testator's object. The more approved opinion, however, is, that it is not lawful; for a bequest of produce is a bequest of money, as it is that which constitutes pro-

\* By the term "*produce*" [Arab. *Hâsil*] as here used, is to be understood the *earnings* or *hire* of a slave, or the *rent* of a house, &c.

duce;

duce; whereas residence or service is an enjoyment of the use; and the effect of these is different with respect to the heirs; for if any just debt should afterwards appear against the testator, it might be repaid by means of a restitution of the rent by the legatee, which could not be done in case of his having had the actual use.

It is not lawful for the usufructuary legatee of a slave or a house to let them out to hire. *Shaf'ei* maintains that he is at full liberty so to do, because, in consequence of the bequest, he becomes (as it were) proprietor of the article; and, as such, he is entitled to transfer it either for a return or otherwise, usufruct (according to him) being equivalent to actual property. It is otherwise with a *loan*, that being (according to his tenets) simply a *licence* [to the use of a thing,] not an *investiture* \*. The arguments of our doctors upon this point are twofold.—FIRST, a bequest is an endowment with property, without a return, referred to the testator's decease; and hence the legatee is not empowered to make a transfer of the legacy even *without* a return, because of the analogy it bears to a *loan*; for a *loan*, according to our doctors, is an investiture with the use of a thing granted in the lifetime of the lender; and the borrower is not permitted to *hire out* the article lent, (hire being an investiture for a return) so here likewise.—A proof of this is that an investiture for a return is strong and binding, whereas investiture without a return is weak and not binding; and a person who is not empowered with respect to the *weakest* of the two cannot be empowered with respect to the *strongest*. Bequest, moreover, as being a gratuitous deed, is weak and not binding.—Now in gratuitous deeds the voluntary agent is at liberty to retract, not the other party:—but as, in the case of a bequest, the voluntary agent is the *testator*, and it is impossible for him to retract after his decease, retraction is therefore not supposed possible in this instance;—yet still as the bequest is not originally of a forcible and irrevoc-

nor does a bequest of the *use* entitle him to let it to hire.

\* See Vol. III. p. 277.

able nature, the legatee of usufruct is of course not at liberty to let the article to hire, since hire, as being a contract of exchange, is forcible and irrevocable. **SECONDLY**, usufruct (according to our doctors) is not property; but the investiture of it for property induces a creation of the character of worth in it, necessarily, in order to establish an equality between the articles opposed to each other in exchange. Now the power of such creation rests only with one who is a proprietor of usufruct as a dependant of his right of property, or in consequence of a contract of exchange, and who is consequently empowered to make over the property to another in the same manner in which he himself may have held it. But when a person who acquires the property of usufruct without any return on his part, and in an original manner, (that is, not in virtue of its subjection to something else,) afterwards makes it over to another for a return, it follows that he makes another proprietor of a thing in a degree superior to what he himself in effect was, which is unlawful.

A bequest of the use of a slave does not entitle the legatee to carry him out of the place, unless his family reside elsewhere.

If a person bequeath the service of his slave to another, the legatee is not entitled to carry the slave from the city of the testator;—unless his own family reside in another city, in which case he may carry him thither, provided he exceed not a third of the testator's property. The reason of this decision is, because the bequest must take effect and be executed in conformity with the intent of the testator; and in a case where the family of the legatee reside in the same city with the testator, his intent is that the legatee shall take the service of the slave there, without exposing him [the slave] to the trouble of a journey elsewhere;—whereas, on the other hand, where the family of the legatee reside in a different city, the intent of the testator is that the legatee shall carry the slave thither in order that the family may enjoy the use of his service, without putting them to the trouble of removing to his [the testator's] city to enjoy this advantage.

If

IF a person leave one year's product of his slave or house to another, and he have no other property except such house or slave, the legatee in that case receives one third of a year's product; because product, as being property, is capable of division. If, therefore, the legatee require the heirs to make a division of the house, in order that he may himself collect the product from his own share, (being a third,) it would not be admitted. *Abou Yoosaf*, indeed, according to one report, holds a contrary opinion; for he argues that the legatee is a partner with the heirs; and a partner has a right to demand a division of the common property. In answer to this, however, it may be observed that this right amongst copartners arises from their having a property in the article itself; whereas the legatee, in the present instance, has a property only in the *product* of the article, and consequently is not entitled to demand a division.

A bequest of a year's product, if the article exceed a third of the estate, does not entitle the legatee to a confinement of it.

IF a man bequeath the *person* of his slave to *Zeyd*, and the *service* of him to *Omar*, and the slave exceed not a third of the testator's estate, his person belongs to *Zeyd*, and his service to *Omar*; for as the testator has bequeathed a specific thing to each legatee respectively, each is therefore entitled to his own right. As, moreover, (the bequest to the usufructuary legatee being at any rate valid,) if the slave's person had not been bequeathed, that would have belonged to the heirs, at the same time that his services would have belonged to the legatee; so in the same manner his services belong to the legatee of usufruct where the testator has bequeathed his person to another; for bequest resembles inheritance, inasmuch as the right of property to the article is established after death in both instances.

In a bequest of the use of an article to one, and the substance of it to another, the legatee of usufruct is exclusively entitled to the use during his term.

IF a person bequeath his female slave to one and the child in her womb to another, or a ring to one and the stone of it to another, or a leathern bag, containing dates, to one, and the dates to another; and the legacy do not exceed a third of the estate,—in this case the first legatee gets his legacy, but the legatee of the *contained* article is not

A bequest of an article to one, and its contents to another, if *correctly* expressed, entitles the se-

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entitled

cond legatee  
to nothing.

entitled to any thing. This is where the second bequest is immediately connected in the same sentence with the first. But if they be mentioned separately, (as if the testator should first say “ I bequeath “ my female slave to *Zeyd*,” and then remain silent, and afterwards say “ I bequeath the child with which she is pregnant to *Amroo*,”) the effect, according to *Abou Roosaf*, is the same as above mentioned; whereas *Mohammed* maintains that in this case the female slave goes to the first legatee, and her child is shared equally between the two; (and the same holds with respect to the two other cases of the *ring* and the *bag*.) The argument of *Abou Roosaf* is that as the testator first bequeathed the female slave, and afterwards the child in her womb, it may be inferred that his object in the first bequest was the female slave only, the second bequest being merely an explanation of his meaning in the first,—which explanation is approved, whether it be connected in the same sentence or not; for as the bequest is not binding till after the death of the testator, his explanation connectedly or *unconnectedly* is one and the same\*; in the same manner as holds where a person first bequeaths the person of his slave to one and afterwards the service of him to another,—in which case the legatee of the person is not a partner of the legatee of usufruct with respect to the service of the slave. The argument of *Mohammed* is that the word *ring* comprehends both the stone and the hoop, and so likewise, the word *female slave* comprehends both the slave herself and also the child in her womb,—and the word *bag* includes both the bag and its contents. With respect, therefore, to the ring-stone, the child, and the contents of the bag, there are two different bequests to two different persons, where both the legatees are equal partners in each. Nor is the second bequest, in this instance, a retraction of the first, it being, in effect, the same as where a person first bequeaths a ring (for instance) to one, and again bequeaths the same ring to another,—in which case

\* In other words, “ he is at liberty, at any period after making the bequest, to alter “ or amend it.”

th

the second bequest is not a retraction of the first, but the two legatees are equal partners in the ring; and so here likewise. It is different where a man first bequeaths the person of his slave to one, and then the property of him to another, as the word *slave* does not comprehend the *service* of that slave. It is also different where a second bequest follows in immediate connexion with the first; for in that case the whole forms (as it were) one sentence, indicating the design of the testator to be that the *hoop* of the ring (for instance) shall go to one, and the stone to the other.

If a person bequeath to any one “the fruit of his garden,” in that case the legatee gets the fruit actually in being at the time of the testator’s death, not what may be produced afterwards. If, however, the testator say “I bequeath the fruit of my garden *perpetually*” “to such an one,” the legatee is in that case entitled to the fruit then existing, as well as to whatever may afterwards grow there during his life. But if, on the other hand, the testator bequeath the *produce* of his garden, (not the *fruit*,) the legatee is then entitled to the present produce and to whatever may be collected from it until his death, although the word *perpetual* should not have been expressed; for as the word *fruit*, in its common acceptation, means a thing actually in being, it cannot therefore be applied to what is *not* in being, unless by an express provision for that purpose;—whereas *produce*, in the common acceptation of the term, comprehends not only what at present exists, but also what may hereafter exist in succession; and therefore its including what may appear after the testator’s decease does not depend upon the mention of any particular provision or term.

A bequest of the fruit of a garden implies the *present* fruit only, unless it be expressed in *perpetuity*.

If a person bequeath the *wool* of a sheep, or its *milk*, or *young*, and then die, the legatee is in that case entitled to whatever may be extant (of these things) at the period of the testator’s death, and not to what may afterwards appear, notwithstanding the word “*perpetual*” have

A bequest of the produce of an *animal* implies the *existent* produce only, in



every in-  
stance.

have been expressed; as the term *wool*, or so forth, (as mentioned above,) do not comprehend what is not actually in being. It is otherwise with respect to *fruit*, (although that term also, in its common acceptation, comprehends only what is actually existent, and a bequest of non-existent fruit be nevertheless valid,) because ordained contracts\* (such as of gardening and hire) with respect to non-existent fruit being good in LAW, it follows that the word *fruit*, mentioned with a condition of *perpetuity*, comprehends also what is non-existent, and that a bequest of such is valid. It is otherwise with the wool, the milk, or the young of a sheep; for as, with respect to the non-existent of those articles, there are no ordained contracts, a bequest of such is not valid:—contrary to what is existent; for these are subjects of a valid contract (such as *Khoola* and the like,) and therefore a bequest of them is likewise valid.

## C H A P. VI.

### Of Wills made by *Zimmes*.

A church or  
synagogue,  
founded  
during health,  
descends to  
the founder's  
heirs.

IF a *Jew* or a *Christian*, being in sound health, build a church or a synagogue, and then die, such building is an inheritance, according to all our doctors; because *Haneefa* holds an erection of this nature to be equivalent to a *Wakf*, or pious appropriation, which (agreeably to

\* *Ordained* contracts are such as are authorized and sanctioned by the KORAN, and concerning the validity of which, therefore, no doubt can be entertained.

his tenets) is not absolute\*, but descends to the heirs of the founder; and the two disciples, on the other hand, hold all such erections to be sinful in their nature, whence they are of no validity [as a public foundation,] and therefore descend to the heirs [in the same manner as any other of the founder's property.]

If a *Jew* or *Christian* will that, "after his death, his house shall be converted into a church or synagogue for a particular set of people," the bequest is valid, according to all our doctors, and takes effect to the extent of a third of the testator's property; because a bequest has two different characters, the appointment of a successor, and an actual endowment; and the testator is competent to either of these.

In the bequest of a house to the purpose of an infidel place of worship, it is appropriated accordingly,

If a *Jew* or *Christian* will that "his house be converted into a church or synagogue for a sect of people," without specifying the particular sect, the bequest is valid, according to *Haneefa*. According to the two disciples, on the contrary, it is not valid; for a deed of that nature is in reality sinful, although it may appear pious to the testator; and a will for a sinful purpose is null, because the execution of it would be a confirmation of sin. The argument of *Haneefa* is, that the founding of churches or synagogues is held, by these persons, to be an act of piety; and as we are enjoined to leave them to the exercise of whatever may be agreeable to their faith, the bequest is therefore lawful, in conformity with their belief.

whether any particular legatees be mentioned, or otherwise.

OBJECTION.—What is the difference between the building a church or synagogue in the time of health, and the bequeathing it by will, that *Haneefa* should hold it inheritable in the former instance, and not in the latter?

REPLY.—The difference is this: that it is not the mere erecting [of the church, &c.] which extinguishes the builder's property, but

\* See Vol. II. p. 334.

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the exclusive dedication of the building to the service of God, as in the case of *mosques* erected by *Mussulmans*; and as an infidel place of worship is not dedicated to God, indisputably, it therefore still remains the property of the founder, and is consequently inheritable [in common with his other effects;]—whereas a *bequest*, on the contrary, is used for the very purpose of destroying a right of property.

THE bequests of *Zimmees* are of four kinds\*.—I. Those made for purposes held pious in their belief, but not in the belief of *Mussulmans*, such as the building a church or a synagogue, (as already mentioned,) or the slaughter of hogs to feed the poor of their sect; in which cases *Haneefa* holds the bequest to be valid, in conformity with the faith of the testator, whereas the two disciples deem it invalid, as being sinful.—II. Those made for purposes held pious with *Mussulmans*, but not with *Zimmees*, such as the erection of a *mosque*, a pilgrimage to *Mecca*, or burning a lamp in a *mosque*, in all of which instances the bequest is invalid in conformity with the belief of the testator, according to all our doctors; unless, however, it be made in favour of some particular persons, in which case it is valid, as under such circumstance it is an investiture, the mention of “building a *mosque*,” or so forth, being considered merely in the light of a *counsel*,—(in other words, as if the testator had bequeathed his property to particular persons, *counselling* them therewith to erect a *mosque*.) III. Those made for a purpose held pious both by *Mussulmans* and *Zimmees*, such as burning a lamp in the holy temple [of *Jerusalem*,] or waging war against infidel *Tartars*†,—which are valid, whether made in favour of specific persons or not.—IV. Those made for purposes not held pious either by *Zimmees* or *Mussulmans*, such as the support of singers and dissolute women,—which are invalid, as being

\* The distinctions here stated apply solely to bequests for *particular purposes*.

† *Koofr al Toork*: the name by which the bands of robbers who used to infest the northern provinces of *Persia* were formerly distinguished.

of a sinful tendency;—unless, however, they be made in favour of particular persons, and then they are valid.

A SENSUALIST \*, or an innovator †, provided he proceed not to open and avowed infidelity, is, in point of bequest, in the same state with a perfect believer, because the law regards only his *apparent* state, which is that of a *Mussulman*: but if he proceed to open infidelity, he is then considered as an apostate, and with regard to his will there is a difference of opinion, (in the same manner as our doctors have differed with regard to every other deed of such persons,)—*Haneefa* holding that in this case his bequest remains in suspense, and becomes valid upon his repentance, or null upon his death or expatriation,—and the two disciples (on the contrary) maintaining that it is in every respect valid ‡.

The will of a *sensualist* or *innovator* is the same as of an orthodox *Mussulman*, unless he proceed to avowed apostacy.

THE will of an apostate woman is valid. This is approved; because women in such cases are left to themselves, and not put to death, as in the case of men §.

The will of a female apostate is valid.

If a *Moostâmin* bequeath the *whole* of his property to a *Mussulman* or a *Zimmee*, it is valid; for a bequest of the *whole* of an estate is deemed illegal only as it affects the right of the testator's heirs; (whence it is that if they assent such bequest is valid;) but the heirs of the *Moostâmin* are possessed of no cognizable rights, they being, as it were, dead, so far as relates to the *Mussulman* government, because of their being in a hostile country. Besides, the property of a *Moostâ-*

A *Moostâmin* may bequeath the *whole* of his property:

\* Arab. *Sâhib-al-hâwa*. *Hâwa* signifies the sensual passions, a complete conquest over which is essential to the character of a good *Mussulman*.

† Arab. *Sâhib-al-biddât*. A free-thinker or sectary.—A broacher of new and heterodox opinions in matters of faith.

‡ For a full explanation of this see Vol. II. p. 236.

§ See Vol. II. p. 227.

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*min* is in security only in virtue of the protection he receives from the state, which protection he enjoys in his own right, not in right of his heirs.

but if he bequeath a *part* only, the residue is transmitted to his heirs.

IF a *Moostámin* bequeath a part of his property, the bequest is executed accordingly, and the remainder is transmitted to his heirs, notwithstanding they be residents in an hostile country; such being the law with respect to *Moostámins*.

An emancipation, or *Taabeer*, granted by him on his deathbed, takes effect *in toto*.

IF a *Moostámin*, immediately before his death, emancipate his slave, or make him a *Modabbir* in the *Mussulman* territory, it is valid, and the slave is accordingly free, notwithstanding his value exceed a third of his master's estate; for a bequest beyond a third of the property is deemed illegal only as it affects the right of the testator's heirs; but a *Moostámin*'s heirs possess no cognizable right, as was already mentioned.

Any bequest in favour of a *Moostámin* is valid.

IF a *Mussulman* or *Zimnee* make a will in favour of a *Moostámin*, it is valid; for a *Moostámin*, so long as he resides in a *Mussulman* country, is considered in the light of a *Zimnee*; and as the exercise of generosity and benevolence in favour of such is therefore allowed to *Mussulmans* during life, it is also permitted them to extend such acts to a period after their death.—(It is related of *Hancefa* and *Aboo Yoosaf*, that they held wills in favour of *Moostámins* to be illegal, because of their intention to return to their own country; and also, because the *Mussulmans* not only allow this, but even do not suffer them to reside in their dominions more than a year, unless they submit to the payment of the capitation-tax.—The former is, however, the better opinion.)

The bequests of a *Zimnee* are subject to

IF a *Zimnee* bequeath more than a third of his estate to a stranger, or to an heir, it is not valid, as being contrary to the laws of the *Mussulmans*,

*Mussulmans*, to which they have agreed to conform with respect to all temporal concerns.

the same restrictions with those of a *Mussulman*.

IF a *Zimmee* make a will in favour of an infidel of a different persuasion, it is valid, because of the analogy of legacies to succession by inheritance, all the different descriptions of those persons who disbelieve the true faith being considered as of one class.

He may make a bequest in favour of an unbeliever of a different sect,

IF a *Zimmee*, residing in the *Mussulman* territory, make a will in favour of a hostile infidel, it is not valid; for as inheritance does not obtain between those, because of the difference of country, it follows that a bequest from the one to the other is of no effect, bequest being similar to inheritance.

not being a *hostile infidel*.

## CHAP. VII.

### Of Executors and their Powers.

IF a person appoint another his executor, it remains with that other either to accept of or decline the appointment, in the presence of the testator; because no one has the power of compelling another to interfere in his concerns. But if the executor accept his appointment in the presence of the testator, and afterwards, either in his absence, or after his death, decline it, such refusal is not admitted; because the testator had placed a reliance on his consent; and therefore, if the

An executor, having accepted his appointment in presence of the testator, is not afterwards at liberty to reject it.

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rejection

rejection were allowed of, either in his absence or after his decease, he would necessarily be deceived.

His silence leaves him an option of rejection;

but any act indicative of his acceptance binds him to the execution of the office.

If a person appoint another his executor, and that other remain silent, without giving any indication of his acceptance or refusal, he is in that case at liberty, after the death of the testator, to accept or refuse the appointment, as may be most agreeable to him. But if a person, under such circumstances, should, immediately after the death of the testator, dispose of any part of the effects by sale, then, as an act of this kind is a clear indication of his acceptance, the executorship becomes obligatory on him. The sale, moreover, is valid in this instance, notwithstanding the executor may not have considered himself as such at that time; for his executorship (like inheritance, bequest being a sort of succession as well as inheritance,) does not depend on his knowledge; and, as being an executor, a sale transacted by him is valid.

Having rejected the appointment, after the testator's decease, he may still accept of it, unless the magistrate appoint an executor in the interim.

If a person appoint another his executor, and the person so appointed remain silent until the testator's decease, and then reject the office, and afterwards declare his acceptance of it, such acceptance is valid, unless the *Kázee*, during the interim, should have set him aside, and appointed another, in consequence of his first declaration; because the refusal does not immediately annul the appointment, that being injurious to the deceased; and although the continuance of it be prejudicial and troublesome to the executor, still he has the *merit* of it, which is an equivalent for the disadvantage,—whereas the injury to the deceased has nothing to counterbalance it. The executorship therefore endures in this case. If, however, the *Kázee* set him aside, his decree to that effect is valid, as he possesses the power of removing an inconvenience, to which executors are frequently subjected, and which may render the continuance of the office injurious to them. The *Kázee*, therefore, to remedy this, may discharge the executor

executor from his office, and appoint another in his room, to act with the estate, thereby preventing an injury both to the executor and the deceased. If, moreover, the executor, after being thus dismissed by the *Kâzee*, declare his willingness to undertake the executorship, such declaration is not admitted or attended to, as he here assents after his appointment having been altogether annulled by the order of the *Kâzee*.

A PERSON may appoint a slave, a reprobate\*, or an infidel, to be his executor; but it is incumbent on the *Kâzee* to annul such appointment, and nominate another person, because of the disadvantages which would attend the confirmation of it in either of those instances; for a slave could not act but by the power of his master; a reprobate may be suspected of fraud; and it is not fit such a trust should be committed to an infidel, as the enmity which every infidel may be supposed to entertain towards a *Mussulman* on the score of religion will occasion a disregard to his interest. The dissolution of such appointments is therefore incumbent on the *Kâzee*, notwithstanding their original validity.

Where a slave, a reprobate, or an infidel, are appointed, the magistrate must nominate a proper substitute.

IF a person appoint his own slave his executor, any of the heirs being arrived at the age of maturity, it is not valid; because such heirs may prevent the slave from the execution of his office by selling their property in him to another, and thereby rendering him incapable of acting but by the consent of the purchaser. If, on the contrary, the heirs be all infants, the appointment is in that case valid, according to *Haneefa*. The two disciples maintain that it is not valid; (and such is what analogy would suggest;) because slavery is incompatible with the exercise of power; and also because, in this particular instance, it would follow that the property was master over the proprietor, which is contrary to LAW. The argument of *Haneefa*

The appointment of the testator's slave is invalid, if any of the heirs have attained to maturity; but not otherwise.

\* Arab. *Fâsik*. (The term has been repeatedly defined.)



is, that the slave is sane and adult, and therefore capable of the discharge of such trust. Neither has any person the power of prohibiting him from it, because the heirs, although they be his masters, yet cannot exert this power, on account of their youth. As, moreover, the deceased appointed him to this trust, it may hence be inferred that his tenderness, and regard for the heirs was superior, in his opinion, to that of any other. This appointment, therefore, is valid; in the same manner as that of a *Mokâtib*;—in other words, if a person appoint his *Mokâtib* his executor it is valid; and so here likewise.

In case of the executor's incapacity, the magistrate must give him an assistant:

If an executor be unequal to the execution of his office, it is incumbent on the *Kâzee* to associate another with him, in order that the duties of the office may be properly executed.

but he must not do so on the executor pleading incapacity, without due examination;

If an executor represent to the *Kâzee* his inability to execute the duties of his charge, it is requisite, in such case, that the *Kâzee*, before he attends to his representation, make particular enquiry into the truth of it, as complainants of this kind often assert falsehoods, with a view to alleviate their own burden. But if it shall appear to the *Kâzee*, on due examination, that the executor is utterly incapable of the office, he must release him, and appoint another in his place, this being advantageous both to the executor and to the estate.

and if he appear perfectly equal to the office, he cannot be removed.

If an executor be perfectly equal to the discharge of his office, and trustworthy therein, the *Kâzee* is not at liberty to dismiss him; for any person whom the *Kâzee* may appoint in his place must be less eligible, as the deceased had particularly selected him, and signified his confidence in him. He therefore must be continued in preference to all others; even to the testator's father, notwithstanding his supposed tenderness; and consequently to others *a fortiori*.

If

IF all or part of the heirs prefer a complaint against the executor, still the *Kázee* must not dismiss him immediately, nor until his guilt be ascertained, as he acts under an authority derived from the deceased. If, however, he prove culpable, it is incumbent on the *Kázee* to dismiss him and appoint another in his place; for the deceased nominated him to the office from supposing him worthy of confidence; but upon being found culpable he no longer continues so, inasmuch that if the testator were living he would himself discharge him;—and as *he* is incapacitated, by death, from so doing, the *Kázee* must take this upon him as his substitute.

He cannot be removed on the complaint of the heirs, unless his culpability be ascertained.

IF a man appoint two executors, neither of them is entitled, according to *Haneefa* and *Mobammed*, to act without the other, except in particular cases, of which an explanation shall be hereafter given.—*Abou Yoosaf* is of opinion that in all cases either of them may act without the other, because, an executor is endowed with his power of action in virtue of the will of the testator; and as power of action is a thing sanctioned by the LAW, and incapable of division\*, he enjoys his power complete and perfect in the same manner as a complete authority to contract their infant sister in marriage appertains to each of her brothers respectively.—(The ground of this is, that executorship is a succession, which succession cannot be established in the executor, unless the authority of the testator devolve to him in the same degree in which it had appertained to the testator, that is, completely and perfectly.)—The testator's choice, moreover, of the *two* to be his executors is an argument of the particular attachment of each to his interest, which attachment is equivalent to the consanguinity of two brothers in the point of contracting their infant sister in marriage.—The arguments of *Haneefa* in support of his opinion are twofold.—FIRST, the power of an executor, being derived from the testator, is of consequence to be exercised in the manner prescribed by him; and

One of two joint executors cannot act without the concurrence of the other;

\* That is, cannot be enjoyed or exercised *partially*.

in the case in question the testator has entrusted this power to both the executors, on the condition of their being *united* in the trust, for he does not expressly assent to their acting otherwise than jointly, and the above condition is moreover attended with advantage, as the deliberations of *two* persons are better than of *one*. It is otherwise with two brothers, in the circumstance of contracting their infant sister in marriage, (as adduced by *Abou Yoozaf*;) since the cause of such authority being vested in them is *relationship*, a cause which exists equally in each. The contracting in marriage, moreover, is a right of the infant, resting upon her guardian, (inasmuch that if the infant require her guardian to contract her to any person, being her equal, for whom she has a liking, he must comply,) whereas, in the case here considered, the acting [with the estate] is the right of the executor himself, not of another *resting upon him*. In the case of contracting the infant in marriage, therefore, if one of the two brothers so contract her, he merely discharges a *duty* incumbent on the other brother, and his act is therefore valid; whereas, in the case of executorship, if one of the two act alone, he exercises a right appertaining to the other, and his so doing is therefore invalid;—in the same manner as where two persons owe a sum of money to one, in which case it would be perfectly lawful for either of them to discharge the whole debt, whereas, supposing *one* man to owe a sum of money to *two* others, it would not be lawful for him to pay the whole to either of them. The cases excepted by *Haneefa* and *Mohammed*, in which they hold the acts of either executor, singly, to be valid, are such as require *immediate* execution. Thus it is lawful for either executor, singly, to disburse the funeral charges, as a delay in this might occasion the body to become offensive; whence it is that a similar power, is vested in the neighbours. In the same manner, either of the executors, singly, may purchase victuals or clothes for the infant children of the testator, this being a matter of urgency, and which admits of no delay. So, likewise, it is lawful for either of the executors to restore a deposit, an usurped article, or a thing purchased by the testator under

except in such matters as require immediate execution,

or which are of an *incumbent* nature,

under an invalid contract. In preserving the estate of the testator, also, and in discharging his debts, the act of either executor is lawful independant of the other. For none of these are considered as an *exercise of power*, but merely the performance of a duty,—inasmuch that the depositor has himself a right to seize and carry away his deposit, if he find it among the effects of the deceased, and the creditor has a similar right with regard to his debt;—and it is, moreover, the duty of every one into whose hands property may fall, to attend to the preservation of it, whence this comes under the description of *aid and assistance*, not of an *exercise of power*;—neither do any of these acts require thought or consideration. Either of the executors has also a right singly to discharge a legacy, or emancipate a slave, if directed by the testator, because such deeds require no thought or consideration. In the same manner, either of them may institute a suit in claim of the rights of the testator, because a conjunction of both in so doing would be impracticable, since, if they were to do it at one and the same time in the assembly of the *Kázee*, they must occasion noise and confusion;—(whence it is that only one of two agents for litigation is allowed to plead at a time.) The acceptance of a gift for an infant is likewise an act which either may perform singly; for in case of delay there is a possibility of the gift being rendered null by the death of the donor previous to the seizure. These acts, moreover, being permitted to a mother and nurse, is a proof that they are not *exertions of power*. It is likewise permitted to any of the executors, singly, to sell goods where there is an apprehension of their spoiling, as in the case of fruit, and the like; and also to collect together and preserve the scattered property of the testator, as a delay might occasion the destruction of it; and such permission is, moreover, given to every person into whose hands property may fall, whence it may be inferred that this is not an exertion of power. (It is recorded, in the *Jama Sagheer*, that none of the executors, where there are more than one, has singly the power of selling goods, or receiving payment of

or in which  
the interest or  
advantage of  
the estate are  
concerned.

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debts,

debts, because these are exercises of power which they must perform jointly, in conformity with the will and intention of the testator.)

Case of a testator appointing different executors at different times.

IF a person appoint two executors in a separate manner, (as if he should first say to the one "I have appointed you my executor," and again, at a different period, to the other "I have appointed you my executor,") some allege that in this case each of them has individually a power of exercising the functions of his appointment, without consulting the other, in the same manner as two agents, where they are appointed by different commissions;—the reason of which is that the testator, in appointing the two separately, indicates his assent to each acting from his own judgment, without the others assistance or advice. Others, again, say that concerning this case also a disagreement subsists between *Haneefa* and *Mohammed* on one side, and *Abou Yoosaf* on the other; because a will is not established until the death of the testator; and at that time both are executors together, notwithstanding they had been appointed separately. It is otherwise with two agents appointed under different commissions; for the appointment of each of those still continues distinct and separate, as settled by the constituent.

In case of the death of a joint executor, the magistrate must appoint a substitute,

IF one of two executors die, it is incumbent on the *Kāzee* to appoint another in his room. This is the opinion of *Haneefa* and *Mohammed*; because, according to their doctrine, the remaining executor has not, of himself, power to act on every occasion, and the interest of the deceased therefore requires the appointment of another to operate with him; and it is also the opinion of *Abou Yoosaf*, because, although the remaining executor be (according to him) empowered to act of himself, still it behoves the *Kāzee* to appoint another his companion; for the design of the testator evidently was, to leave two successors the management of his concerns; and as this may be fulfilled by the appointment of a substitute for him who dies, one must be appointed accordingly.

IF

IF the deceased executor have appointed the living executor to act for him, it is in that case lawful for the latter (according to the *Zābir Rawāyet*) to act alone, nor is it incumbent on the *Kāzee* to appoint another in the room of the deceased; because here the judgment of the deceased executor virtually subsists in the living one, as it were, by succession.—(There is a tradition of *Haneefa* having contradicted this doctrine, because of its repugnance to the object of the testator, namely, the agency of two persons: in opposition to the case where a dying executor appoints some other person to succeed him; for such appointment is valid, because of its being attended with the advantage of the judgment of two distinct persons, as was intended by the testator.)

unless the deceased have himself nominated his successor.

IF an executor, previous to his death, appoint another person *his* executor, in that case the person so appointed is entitled to act as executor, both to him, and also to the person to whose affairs his immediate testator had acted as executor. This is according to our doctors. *Shafei* maintains that the person so appointed is not entitled to act as executor to the first deceased, because of the analogy his appointment bears to that of an agent; in other words, if a person, during his lifetime, appoint an agent to act for him, that agent is not permitted to delegate his powers to another without having previously obtained the consent of his constituent.—(The ground of analogy between these two cases is, that in the same manner as the constituent is supposed to place a reliance on the agent, and on him only, so also the testator may be supposed to act with regard to the executor.) The arguments of our doctors upon this point are twofold.—FIRST, an executor derives his power from the testator; and it is therefore lawful for him to appoint an executor to succeed him;—in the same manner as in the case of a grandfather; in other words, a father has the power of bestowing his child in marriage, which devolves upon *his* father after his death; and the grandfather has in such case the power of appointing an agent for the execution of the child's mar-

The executor of an executor is his substitute in office.

the testator  
in the  
-d. 1731  
1731

riage; and so likewise, it is lawful for an executor to appoint another executor, as the power appertaining to the testator devolves upon his executor, in the same manner as a father's right to dispose of his child in marriage devolves upon the grandfather. As, moreover, the grandfather is the father's substitute with regard to the power which devolves to him, so in the same manner the executor is the substitute of the testator; because the nomination of an executor is, in effect, an appointment, by the testator, of a substitute with respect to the matters in which he is himself empowered; and as the executor, at the time of his death, possessed a power with respect to both estates, (his own, and also that of his testator,) it follows that the second executor (that is, the one appointed by him) is his substitute with respect to both estates also.—SECONDLY, as the testator had recourse to the existence of the executor, notwithstanding he knew there was a possibility of his dying in the interim, and thereby leaving his object unaccomplished, it may be inferred that his intention was that his executor should in such case appoint another. It is otherwise with an agent; for he is not at liberty to appoint any other person *his* agent without the consent of his constituent; because, as the latter is still living, and consequently has it in his power to accomplish his object himself, it is therefore not to be supposed that he will consent to his agent appointing another agent under him.

An executor is entitled to possess himself of the portions of infant and absent adult heirs, on their behalf;

If an executor, the legatees being present, divide off the estate of the testator from the legacies, on behalf of his heirs who are infants, or adult absentees, and take possession of their portions, it is lawful; for an heir is successor to the deceased; and as an executor is also a successor to him, he is of course a competent litigant on behalf of infant or absent heirs, and may, of consequence, make a division, and possess himself of their portions on their behalf,—inasmuch that if those portions were to perish in his hands, still they are not at liberty to participate with the legatees in what remained to them after such division.

15. If, on the contrary, an executor, the heirs being adult and present, divide off the legacies from the estate, and take possession of them on behalf of infant or absent legatees, it is unlawful; for a legatee is not a successor to the deceased in every respect, he being constituted a proprietor by a new and supervenient cause; and as, therefore, the executor does not stand as litigant on his behalf, his taking his [the legatee's] portion is not valid,—inasmuch that if the legacy were to perish in his [the executor's] hands, the legatee would be entitled to take a third of whatever had remained to the heirs. Neither is any compensation due from the executor in this instance; because an executor is a trustee; and as the power of conserving the effects of the testator is lodged in him, the case is therefore the same as if the loss had happened previous to the division of the effects.

but not of the legacies of infant or absent legatees.

If a person bequeath a sum for the performance of a pilgrimage to *Mecca*, and then die, and the executor divide off the said sum from the heirs, and take possession of it, and it be afterwards lost or destroyed, either in his charge, or in that of the person whom he had appointed for the performance of the pilgrimage, in that case, according to *Haneefa*, a third of the remaining property of the deceased must be appropriated for the pilgrimage. *Aboo Yoozaf*, on the other hand, holds that if the sum thus lost have been originally equivalent to a third of the property, nothing is afterwards to be taken from the heirs; but that if it was less, the deficiency must be applied to the purpose of the pilgrimage. *Mohammed*, on the contrary, is of opinion that in neither case is the executor to take any thing from the heirs; because the setting aside of a particular sum, for the performance of the pilgrimage, was the undoubted right of the testator; and as, if he had himself set aside the sum for that purpose, and it had afterwards been lost or destroyed, nothing further would have been required, and the legacy would have been void, it is in the same manner void where the sum was set aside by the executor, as he acts for, and stands in the place of, the deceased. The argument of *Aboo Yoozaf*,

**A legacy appropriated to pilgrimage, if lost, must be repaired, to the extent of a third of the estate.**

**in**



in support of his opinion, is that a third of the whole property is a fund for the execution of wills, to which extent only they are to be executed, and no farther. The arguments of *Haneefa*, in support of his opinion on this point, are twofold. FIRST, the performance of the pilgrimage was the object of the testator, not the setting aside a sum for that purpose; and therefore the appropriation or delivery of the money, without the accomplishment of the object, is of no consideration, it being, in effect, the same as if the sum had been lost previous to the division,—in which case a third of the remainder would be appropriated to the pilgrimage. SECONDLY, the division, with respect to the legacy, is not perfect and complete until the portion bequeathed for the purpose of pilgrimage be expended thereupon, as there is no person to take possession of it\*. Where, therefore, this sum is not expended in the performance of pilgrimage, the partition is incomplete, and the case is (consequently) the same as if the sum had been lost or destroyed before the partition.

A legacy, after being divided off by the magistrate, descends to the legatee's heirs in case of his decease.

If a person bequeath a third of one thousand *dirms* to another who is at that time absent, and the heirs consign the said sum to the *Kâzee*, in order to divide and set apart the share of the absent legatee, the division thus made by the *Kâzee* is valid, because of the original validity of the will, inasmuch that if the absentee should afterwards die, previous to his having declared his acceptance, the legacy nevertheless devolves to his heirs. The office of *Kâzee*, moreover, is instituted with a view to the benefit of mankind, that he may attend to the conservation of their rights, especially with respect to such as are dead or absent;—and as among these attentions to the rights of mankind is the setting aside and taking possession of the portions of absentees, such acts by him on behalf of an absentee are valid of course,—inasmuch that if such portion were destroyed in his possession, and the

\* In other words, there is no *individual* legatee.

legatee

legatee should afterwards appear, still he would have no claim upon the heirs.

It is lawful for an executor, in order to discharge the debts of the deceased, to sell a slave for a suitable price, in the absence of the creditors; for as the testator might have done so during his lifetime, the executor, as his representative, is entitled to do the same. The ground on which this proceeds is, that the right of the creditors to the effects of the deceased lies, not in the things themselves, but in their worth; and the worth of the slave is not annihilated by the sale, as the price (which is in reality the worth) still remains. It is otherwise with respect to an indebted slave; for the sale of such in the absence of the creditors is not valid, as their right lies in the *person* of the slave, they having a claim to the earnings of his labour, which would be annihilated by the sale of him.

An executor may sell a slave of the estate, for the discharge of the debts upon it, in absence of the creditors,

unless the slave be involved in debt.

If a person appoint another his executor, directing him, after his decease, to sell a slave, and bestow the price in charity, and the executor accordingly sell the slave and take possession of the price, and it be afterwards lost or destroyed with him, and the slave prove to be the property of another person, he [the executor] is accountable to the purchaser for the price, agreeably to the laws of sale; and he is entitled to take an equivalent from the effects of the deceased, being, as it were, an agent on his behalf. This indemnification, according to *Haneefa*, he is to take from the whole of the estate at large, and such is the *Zâbir Rawâyet*. It is recorded from *Mohammed*, on the contrary, that he is to indemnify himself from the third of the effects; as the instructions of the deceased were in the nature of a will; and the third of the property is the fund for the execution of a will. The ground of the doctrine of the *Zâbir Rawâyet* is, that as the executor, in the sale of the slave, was deceived by the testator, the restitution made by him to the purchaser is therefore a debt due to him from the testator; and the debts are discharged from the *whole* of the estate,

An executor, having sold and received the price of an article which afterwards proves to be the property of another, is accountable to the purchaser for the price he had so received;

not from the third. It would be otherwise if the *Kázee*, or his *Amra*, should sell the slave, and he afterwards prove the property of another; for in this case the obligations of the sale do not rest upon those officers, but the purchaser comes at once upon the estate for an equivalent to the price lost or destroyed as above; since otherwise the door of magistracy would be shut, and the rights of mankind consequently injured, as no man will undertake the office of *Kázee* unless he be exempted from responsibility. It is to be observed that what is now advanced, that “the executor is to take an equivalent from the effects of the deceased,” proceeds on the supposition of these being sufficient to answer this purpose; for if they be inadequate to it, the executor is entitled to an indemnification only in the greatest possible degree; and if the deceased should have no effects whatever, the executor (like any other creditor) has no claim for indemnification.

but if this have been lost, he may reimburse himself from the person to whom the article had fallen by inheritance.

If an executor sell a slave which had fallen to the share of a child of the deceased, and take possession of the price, and it be afterwards lost in his hands, and the slave prove the property of another person, the purchaser has in that case a claim for restitution from the executor, who is entitled to indemnify himself from the share of the child in whose behalf he acted;—and the child is entitled to an equivalent from the shares of the other heirs; for upon the slave proving the property of another person, the distribution of inheritance, as at first executed, is annulled, the case being, in fact, the same as if no such slave had ever existed, or been accounted upon as part of the estate.

An executor may accept a transfer for a debt due to his infant ward,

If a person indebted to an orphan give a transfer on some other person, and the executor (the guardian of the orphan) accept the same, such acceptance is approved, provided it be for the interest of the orphan, because of the person on whom the transfer is made being richer (for instance) than the transferrer, and also a man of probity; for the power of acting is vested in the executor, merely that he may employ it for the interest of the orphan:—but if the transferrer be richer

richer than the other, the acceptance is not approved, as being, in its tendency, prejudicial to the orphan.

It is lawful for an executor to sell or purchase moveables, on account of the orphan under his charge, either for an equivalent, or at such a rate as to occasion an inconsiderable loss,—but not at such a rate as to make the loss great and apparent; because, the appointment of an executor being for the benefit of the orphan, he must avoid losses in as great a degree as possible;—but with respect to an *inconsiderable* loss, as in the commerce of the world it is often unavoidable, it is therefore allowed to him to incur it, since otherwise a door would be shut to the business of purchase and sale.

or sell or purchase moveables on his account.

AN executor, in giving a bill of sale, must not insert his power as an executor in it, but must give a separate paper to that effect, out of caution; for if the latter also were inserted, it might happen that the witness to the sale might set his name to the bottom of the instrument without examination, which would implicate a false testimony, since with the executorship he has no concern. Some, moreover, have asserted that the attestation of the witness ought to run in this manner—“Sold by *Zeyd* the son of *Omar*,” and not “by *Zeyd* the executor of such a person:”—but others maintain that this is immaterial, and that the latter mode may with propriety be adopted, as executorship is a matter of notoriety.

AN executor has the power of selling every species of property belonging to an adult absent heir, excepting such as is immoveable;—for as a father is authorised to sell the moveable property of his adult absent son, but not such as is immoveable, his guardian [the executor] has the same power. The ground of this is, that the sale of immoveable property is a species of conservation, as articles of that description are liable to decay, and the price is much more easily pre-

He may also sell moveables on account of an absent adult heir.

served than the article itself. With respect, on the contrary, to immoveable property, it is in a state of conservation in its own nature, whence it is unlawful to sell it,—unless, however, it be evident that it will otherwise perish or be lost, in which case the sale of it is allowed.

He cannot trade with his ward's portion.

IT is not lawful for an executor to trade with the property of the orphan; for the *conservation* of it, merely, is committed to him, not the power of *trading* with it,—according to what is mentioned in the *Awzab* upon this subject.

He may sell moveable property on account of the infant or absent adult brother of the testator.

ACCORDING to *Mohammed* and *Aboo Yoosaf*, the executor of a brother, with respect to an infant brother, or one of mature age, who is absent, stands in the same predicament as the executor of a father with respect to his adult absent son;—(in other words, he is empowered to sell the moveable property of the orphan or absentee;) and so likewise of an executor appointed by the mother or uncle; for as the mother and uncle are permitted to interfere in the management of the property so far as relates to its preservation, so also is the executor who represents them.

The power of a father's executor precedes that of the grandfather.

THE power of the father's executor, in the management of the property of his orphans, is superior to, and precedes that of the grandfather. *Shafei* is of opinion that in this respect the grandfather has the superior power; because the LAW has ordained him to be the representative of the father, where the latter has ceased to exist,—whence it is that [failing the father] the grandfather inherits to his grandson. The argument of our doctors is, that as, in consequence of the will, the authority of the father devolves upon his executor, the executor's authority is therefore that of the father, in effect,—and consequently the father's executor precedes the grandfather, in the same manner as the father himself would. The ground of this is,

that

that as the father, notwithstanding the existence of the grandfather, appointed another to act for his children, it may be thence inferred that he considered such appointment more beneficial to them than if they had been left to the management of the grandfather.

IF a father die without appointing an executor, the grandfather represents the father \*; because a grandfather is most nearly related to the children of his son, and most interested in their welfare;—whence it is that the grandfather is empowered to contract the infant wards in marriage, in preference to the father's executor,—notwithstanding the latter have precedence of him in point of managing and acting with the property, for the reasons already assigned.

If there be no executor, the grandfather is the father's representative.

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## CHAP. VIII.

### Of Evidence with respect to Wills.

IF two executors give evidence that the deceased had associated a third person with them, and that person deny his having done so, the evidence of the executors is of no effect; because their assertion having a tendency to their own advantage, in the case it will afford them from part of their labour, lays them open to suspicion. If, on the contrary, the third person claim or admit of the executorship, their

The evidence of two executors to the appointment of a third is not valid unless he claim or admit it.

\* Literally, "*is in the stead of,*" or "*stands in the place of.*"

evidence is valid, on a favourable construction. Analogy would suggest that here also the evidence is null, in the same manner as in the former instance, and for the same reason. The ground of a more favourable construction, in this particular, is that as the *Kázee* has the power of either appointing an executor at the first, or associating a third person (by that person's consent) with the two executors, without any testimony on their part, it follows that their testimony merely prevents the *Kázee* from the trouble of nomination, by rendering it unnecessary for him to seek out and name a proper person to assist in the executorship;—the person still, however, holding his office in virtue of the *Kázee*'s nomination.

The evidence of orphans to the appointment of an executor is not admitted if he deny it.

If two orphans give evidence that their deceased father had appointed a particular person his executor, and the person mentioned deny the same, their evidence is not credible, being liable to a suspicion in the advantages they would draw from the labours of a person exerted towards the preservation of their property.

The testimony of executors with respect to property, on behalf of an infant,

If two executors give evidence, on behalf of an infant heir [their ward] concerning property of the deceased, or of any other person, it is of no effect; because their testimony merely tends to prove their right to the management of such property.

or of an absent adult, is not admitted.

If two executors give evidence, on behalf of an *adult* heir, concerning property of the deceased, it is of no effect; but it is valid concerning property appertaining to any other person. This is the doctrine of *Haneefa*. The two disciples are of opinion that in both cases the evidence is valid, because it is not liable in either of them to any suspicion, as the power of an executor over the property ceases after the heir attains to maturity. The argument of *Haneefa* is, that as executors have the power of conservation, and also of selling the moveable property of an adult heir in his absence, it follows

follows that their evidence, in favour of an adult heir, concerning any part of the deceased's estate, is not altogether free from suspicion. It is otherwise with respect to their evidence, in behalf of an adult heir, concerning any other property, for over that the executors cannot possess any authority, as the deceased constituted them his substitutes with respect to his own estate only, not with respect to the property of others.

If two persons bear evidence to a debt of one thousand *dirms*, due from a person deceased to *Omar* and *Zeyd*, and *Omar* and *Zeyd* give a similar evidence in favour of these two, the evidence on both parts is valid. If, on the contrary, each of the parties in the same manner give evidence that legacies had been left by the deceased to the other, their attestations are of no effect. This is the doctrine of *Haneefa* and *Mohammed*. *Abou Yoosaf* maintains that in neither case are these evidences valid; and such also (according to the relation of *Khafsf*) is the opinion of *Haneefa*. There is also a tradition of *Abou Yoosaf* having concurred in the opinion of *Mohammed*. The reasons urged in support of the validity of the evidence, in the case of debt, is that debt relates solely to the person; and as the person admits a great variety of rights, the evidence of both parties is therefore admitted.—Neither does it follow, in this case, that either party is to partake of what may be obtained in payment by the other, so as to cause the evidence of this party to be a mere establishment of their own right of participation,—inasmuch that if a stranger were to pay, to one of the parties, of his own accord, the debt alleged to be due to that party, still the other party is not at liberty to claim any share in such payment. The reasons, on the other hand, against the validity of the evidence, in this instance, is that as the death [of the debtor] occasions the relation to shift from the person to the property, since in consequence of the decease the person no longer remains, (inasmuch that if any one party were to obtain payment of his right from the estate of the deceased the other party participates with them therein, provided

The mutual evidence of parties, on behalf of each other, to debts due to each from an estate is valid; but not their evidence to legacies,



provided the estate suffice for the discharge of the debts of both,) it follows that the evidence of each, respectively, in behalf of the other, tends to establish a right of participation in whatever payment that other may obtain in consequence; and accordingly, the testimony is here liable to suspicion. It is otherwise where the debtor is *living*; for in that case the testimony of each party [of creditors] on behalf of the other is admitted; since as the debt, at that time, rests upon his *person*, not upon his *property*, (the former still continuing existent,) a participation, therefore, is not established in this instance.

unless each legacy, respectively, consist of a slave.

If two persons give evidence that a particular person had bequeathed his female slave in a legacy to two others, and the two others give evidence that the same person had bequeathed a male slave to these two, both evidences are valid; for as their testimony does not in any respect tend to establish a participation, it is therefore liable to no suspicion, and must be admitted accordingly.

A mutual evidence of this nature is void where it involves a right of participation in the witnesses.

If two persons give evidence that a particular person had bequeathed the third of his property to *Zeyd* and *Amroo*,—and *Zeyd* and *Amroo*, on the other hand, give evidence that the same person had bequeathed a third of his property to these two, the evidence of both parties is void and of no effect; (and so likewise if the two were to give evidence that the person had bequeathed his male slave to *Zeyd* and *Amroo*,—and *Zeyd* and *Amroo*, on the other hand, give evidence that the said person had bequeathed his female slave to those two;)—because as the evidence on each part tends, in those instances, to establish a right of participation, it is therefore not altogether free from suspicion.

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HEDAYA.

# H E D A Y A.

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## B O O K LIII. OF HERMAPHRODITES.

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### S E C T. I.

*Of who are HERMAPHRODITES.*

**A** *KHOONSA*, or hermaphrodite, is a person possessed of the parts of generation of both a man and a woman. If, therefore, such person discharge urine from the male member he\* is ac-  
Hermaphro-  
dites are ei-  
ther male, fe-  
male,

\* The *gender* of an *absolute* hermaphrodite is dubious. The translator follows the *Arabic* text in expressing it throughout in the *masculine*, that being the most generally applicable.

counted

counted a male, or if from the female member, a female;—because it is so recorded in the traditions, and likewise reported from *Alex*; and also, because the circumstance of the urine being discharged from either member in particular, denotes that member to be the original, and the other merely a defect. If, on the contrary, the person discharge the urine from both members, regard is paid to that from which it first proceeds, as this denotes that member to be the original. If, on the other hand, the person discharge his urine from both members equally (that is, at one and the same time) he is a *Kboonsá*-*moosb'kil*, or equivocal hermaphrodite, according to *Haneefa*;—nor is any regard paid to the superior or inferior quantity of the urine in this instance, because a superiority of discharge from either member does not denote that member to be the primary, since this circumstance arises merely from the urinary passage in the one being wider than in the other. The two disciples maintain that regard must in this case be paid to the comparative quantity of urine; and consequently, that the sex is determined according to the member from which the greatest quantity proceeds; because this denotes that member to be the superior and original; and also, because the greater quantity is, in effect of law, the *whole*. From whichever member, therefore, the principal quantity of urine is discharged, that member is accounted the superior. If, however, the urine proceed from both passages alike, (that is, at the same time, and in equal quantity,) the person is accounted an equivocal hermaphrodite, according to all our doctors, as in this case neither member possesses any superiority over the other.—What is here advanced applies solely to hermaphrodites not yet arrived at the age of maturity;—for upon an hermaphrodite attaining to maturity, if his beard grow, or he have connexion with a woman, or nocturnal emissions, or his breasts appear as those of a man, he is accounted a male, those being indisputable tokens of manhood;—but if the breasts swell like those of a woman, or the menstrual discharge appear, or pregnancy, or carnal connexion with a man, the hermaphrodite is accounted a female, such being the tokens of womanhood. If,

If, on the contrary, no distinguishing tokens of either sex appear, or the tokens of both, (such as a beard, with the breasts of a woman,) the person is an *equivocal* hermaphrodite.

## S E C T. II.

### *Of the Laws respecting equivocal HERMAPHRODITES.*

It is a rule, with respect to equivocal hermaphrodites, that they are required to observe all the more *comprehensive* points of the spiritual law, but not those concerning the propriety of which [in regard to *them*] any doubt exists.

An equivocal hermaphrodite

AN equivocal hermaphrodite, in standing behind the *Imám* for the purpose of prayer, must take his station immediately after the men and before the women, as it is possible that he may be a man, and it is also possible that he may be a woman. If, therefore, he chance to stand among the women, he must recite the prayers repeatedly, for as it is possible he may be a man they would otherwise be nugatory. If, on the contrary, he stand among the men, his prayers are valid; but the men who are next to him are to recite their prayers repeatedly, out of caution, as it is possible that he may be a female.

must take his station, in public prayers, between the *men* and the *women*,

It is laudable in an equivocal hermaphrodite to cover his head, during prayer, with the skirt of his garment, and also to sit in the posture of women; for if he be a man, this is merely a deviation from custom, which does not imply any positive illegality; but if he be a

observing (in other respects) the customs of women.

female, his neglecting so to do would induce an abomination, it being indispensably incumbent on women to be covered upon that occasion. It is also laudable in him, if he be without a garment, to recite the prayers repeatedly; but still the prayers are lawful although he should neglect so to do. It is, moreover, abominable in him to wear filk or jewels.

He must not appear naked before man or woman, or travel along with either, except a relation; and he must be circumcised by a slave purchased for that purpose.

It is abominable in an equivocal hermaphrodite to appear naked before either man or woman, or to be in retirement with either man or woman except his prohibited relations. In the same manner, it is abominable in him to journey in company with a man other than his prohibited relation,—or with a woman notwithstanding she be a prohibited relation, as it is not lawful for two women to travel together, although they be relations. It is also abominable that he be circumcised by either a man or a woman; and therefore, to perform this ceremony, a female slave must be purchased at his expence;—or, if he be destitute of property, the price of such slave must be advanced to him, by way of loan, from the public treasury, with which he may purchase her for the purpose of circumcising him; and having so done, she is to be sold, and her price paid into the treasury, as he has then no farther occasion for her.

Rules to be observed by him during a pilgrimage.

If an equivocal hermaphrodite undertake a pilgrimage during his adolescence, (that is, when nearly arrived at maturity,) *Abao Roosaf* declares he is uncertain which mode of dress is most proper for him to adopt; for if he be a male, his wearing a seamed garment is abominable; and if he be a female, it is abominable to wear any thing else. *Mohammed*, however, says that he ought to wear a seamed garment, in the same manner as women; because it is still more abominable for a woman to neglect this during pilgrimage than for a man to wear it.

Ir

If a man suspend the emancipation of his slave, or the divorce of his wife, upon the circumstance of her producing "a male child," and she be delivered of an *hermaphrodite* child, the divorce or emancipation do not take place until the sex or condition of the child be fully ascertained, since the person cannot incur the penalty, in this instance, because of the doubt.

Divorce or emancipation, suspended upon the circumstance of *sex*, are not determined, in relation to an *hermaphrodite*,

If a man declare, "all my male slaves are free," or, "all my female slaves are free,"—and he be possessed of an *hermaphrodite* slave, this slave is not emancipated until his real condition be ascertained, since here the master cannot be forsworn, because of the doubt. If, on the contrary, he thus mention his male and female slaves together, the *hermaphrodite* is in that case emancipated, since one or other description applies to him indisputably, as he must be either a male or female.

until his sex be ascertained.

If an *hermaphrodite* declare himself to be a male, or a female, and he be of the equivocal description, his declaration is not credited, as his plea is repugnant to the suggestion of proof. But if he be not of an equivocal description, his declaration may be credited, he being better acquainted with his own state than any other person.

His declaration of his sex is not admitted.

If an equivocal *hermaphrodite* die before his condition be ascertained, the ceremony of ablution must not be performed upon his body by either man or woman, neither of those being allowed to perform it to the other. Ablution, therefore, being impracticable in this instance, the ceremony of *teyummim* [rubbing with dust or sand] must be substituted for it;—and it is mentioned in the *Jama Ramooz*, that if the *teya mim* be performed by any other than a prohibited relation, the hand must be covered with a cloth.

Rules to be observed in his interment.

IF a hermaphrodite die at an age bordering on maturity, (at twelve years of age, according to the *Jama Ramoos*;) the corpse is met to have the ceremony of ablution performed upon it, whether it be male or female. Upon depositing it, moreover, in the tomb or grave, it is laudable to cover the same with a cloth, this being indispensable with respect to women, although not with respect to men.

WHEN there is occasion to repeat the funeral prayers over a man, a woman, and a hermaphrodite, at the same time, the bier of the man must be placed next the *Imâm*, that of the hermaphrodite next, and beyond all the bier of the woman.

WHERE there is any reason for interring a hermaphrodite in the same tomb [or grave] with a man, the former must be deposited after the latter, as it is possible that he may be a female; and a partition of earth must also be constructed between them. If, on the other hand, a hermaphrodite be interred in the same tomb [or grave] with a woman, he must be deposited first, as it is possible that he may be a man.

It is laudable to shroud the body of a hermaphrodite in the same manner as that of a woman, by wrapping it in five cloths; for, if it be a female, such is the ordained practice with respect to women; and if it be a male, this is merely an excess of two cloths, which is a matter of no moment.

Rules of inheritance with respect to hermaphrodites.

IF a man die, leaving two children, one a hermaphrodite, and the other a son, in that case, according to *Haneefa*, the whole inheritance is divided between them in three shares, two going to the son, and one to the hermaphrodite; because he holds a hermaphrodite to be subject to the law of a woman, unless his condition be ascertained to be

be otherwise. *Shabbā'a*, on the contrary, maintains that in this case the hermaphrodite is to receive half the share of a male heir, and half the share of a female,—by first calculating the amount of his share, supposing him to be a male, and then the same supposing him to be a female; and adding the two together, and paying him a moiety of the added sums. *Mohammed* and *Abou Yoosaf* subscribe to this opinion. They, however, differ in their exposition of it; for *Mohammed* holds that the whole inheritance is to be divided into twelve parts, seven of which go to the son, and five to the hermaphrodite;—whereas *Abou Yoosaf* alleges that it is to be divided into seven parts, four of which go to the son, and three to the hermaphrodite. The argument of *Abou Yoosaf* is that the son, if he stood alone, would be entitled to the whole inheritance; and the hermaphrodite, if he stood alone, would be entitled to three fourths of the inheritance,—he being entitled (when standing alone) to an half, if accounted a male, or to the whole, if accounted a female; for the whole property consists of four quarters, the half of which is two quarters,—and these, being added together, make six quarters, the half of which is three. Where, therefore, those two unite in one inheritance, the estate is divided between them according to their respective proportions of right; and as the right of the son is to *four* fourths, and that of the hermaphrodite to *three* fourths, the former gets in the proportion of four, and the latter in the proportion of three;—and accordingly, the whole inheritance is divided into seven parts, four of which go to the son, and three to the hermaphrodite. The argument of *Mohammed* is that, supposing the hermaphrodite to be a male, the inheritance would be divided between him and the son in equal shares; or supposing him (on the other hand) to be a female, it would be divided between them in three lots. We must therefore have recourse to the smallest number which admits of division by *two* and by *three*; and as this number is six, it follows that on the former supposition the inheritance is to be divided equally between



between the two, three shares of the six going respectively to each,—or that, on the latter supposition, it is to be divided between them in three lots, two shares of the six going to the hermaphrodite, and four shares to the son. The hermaphrodite, therefore, is entitled to two shares, unquestionably; and there being still a doubt with respect to the one redundant share, that is divided into two. Hence the hermaphrodite gets two shares and an half; and a fraction thus falling to his share, the root of the proposition (six) must be multiplied by two, in order that there may be no fractions\*; and the whole calculation, being twelve, will come out right, in this way, that five go to the hermaphrodite, and seven to the son. The argument of *Haneefa* is, that it is necessary, in the first place, to establish the hermaphrodite's right in the inheritance; and as the smaller portion of inheritance (namely, that of a woman) is unquestionable, and any thing beyond it is doubtful, that alone is to be established, and due, which is certain and indisputable, not any more, as a right to property is not admitted under any circumstance of doubt,—the point in question being, in fact, the same as where a doubt exists with respect to a right in property, founded on any other cause besides inheritance, in which case the *unquestionable* proportion only would be decreed, and so here likewise;—excepting, however, in the case of a *smaller* share† going to the hermaphrodite, supposing him to be a *male*; for then he would be entitled to the share of a son, since, in such instance, that would be his indisputable right;—as where, for instance, a woman dies, leaving heirs her husband, mother, and a full sister‡

\* That is, in order to reduce the whole to integral parts.

† Namely, a smaller share than the half of the whole.

‡ This might be rendered, with more strict propriety, “*a fraternal connexion*,” an hermaphrodite being, in fact, neither a brother nor sister. The translator, however, thinks it most advisable to adhere literally to the original.

who is an hermaphrodite,—or, where a man dies, leaving heirs his wife, two maternal brothers, and a full sister who is an hermaphrodite;—in the former of which cases (according to *Haneefa*) one half of the property would descend to the husband, a third to the mother, and the remainder to the hermaphrodite,—and in the latter, a quarter would descend to the wife, a third to the two brothers, and the remainder to the hermaphrodite; for in both these cases the remainder is smaller than either of the two full shares,—that is, the share of the hermaphrodite supposing him to be a man, and the same supposing the hermaphrodite to be a woman.

HEDAYA.

# H E D A R A.

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## CHAPTER THE LAST.

### MISCELLANEOUS CASES.

The intel-  
ligible signs  
of a dumb  
person suffice  
to verify his  
bequests, and  
render them  
valid; but  
not those of  
a person  
merely de-  
prived of  
speech.

**W**HERE people read a deed of bequest to a dumb person, and desire to know whether they shall testify such deed on his behalf? and the dumb person makes a sign by an inclination of the head, equivalent to the expression of assent "*Yes!*"—or, where a dumb person himself writes such deed, and they thus desire to know whether they shall testify it on his behalf? and he makes a sign, by an inclination of his head, in the affirmative,—the bequest, provided the sign be made in such a manner as is commonly used to denote affirmation, is valid:—but this mode of affirmation by a sign does not

not suffice with respect to a person whose inability to speak is supervenient, occasioned (for instance) by some recent disorder.—*Shafte* maintains that the sign in question is cognizable and valid equally with respect to both; for the inability alone is the cause of its being at all admitted as sufficient, a cause which exists alike in both.—Our doctors, however, conceive a natural difference between a person originally dumb, and one who merely labours under a recent incapacity of speech, for various reasons.—FIRST, signs are not cognizable, unless they be habitual and their meaning ascertained, which is the case with the signs of a dumb person, but not with those of one who has merely lost his speech. (Still, however, our doctors hold that if this person be so long deprived of speech as to render signs habitual to him, and their meaning ascertained, he then stands in the same predicament with a *dumb* person in this particular.)—SECONDLY, the person in question is chargeable with a neglect in not having made his will before he had lost his speech, whereas no such neglect can be charged to the *dumb* person.—THIRDLY, it is most probable that a recent incapacity of speech will be removed and yield to remedies, which is not the case with dumbness, and therefore there is no analogy between them.

WHERE a dumb person is capable of either writing intelligibly, or making intelligible signs, marriage, divorce, purchase, or sale, declared by him, are valid, and retaliation is also executed on his behalf, or upon him; but he is not liable to punishment\*, nor is punishment inflicted on his behalf.—His written deeds are valid, and cognizable, for this reason, that the writing of an absentee is equivalent to the oral declaration of a person actually present; (inasmuch that the prophet, in promulgating his laws, sometimes used one mode, and sometimes another;) and *necessity* is the ground of validity with re-

A dumb person may execute marriage, divorce, purchase or sale, and sue for or incur punishment, by means of either signs or writings; but he cannot thereby sue

\* Meaning, *punishment for offences against God*, namely, for *whoredom* and *slander*; as is explained a little farther on.

for or incur  
retaliation.

spect to the writing of an absentee, which ground exists still more strongly in the case of a *dumb* person.—It is to be observed that writings are of three different sorts or descriptions: I. *regular testimonials*\*, (meaning, such as are executed upon paper, and have a regular title, superscription, and so forth, as is customary,) which are equivalent to oral declaration; whether the person be present or absent: II. *irregular testimonials*†, (meaning, such as are not written upon paper, but upon a wall, or the leaf of a tree, or, upon paper without any title or superscription,) which are not admitted as proof farther than merely as they signify the writer's object or design: and III. writings which are *not* testimonials in any sense‡, (meaning such as are delineated in the *air*, or upon *water*,) which, as they are merely equivalent to words not heard, are no way cognizable, nor attended with any effect.—With respect to *signs* made by a dumb person, they are recognized in the cases of marriage, divorce, and so forth, (as mentioned above,) from necessity, since those are matters in which the right of the *individual* alone is concerned, and which are not restricted to any particular form of words, but are even, in some instances, (such as of *Beeya-Taata*, or sale by a mutual surrender §,) effected without any words whatever; and retaliation also is a right of the individual.—But there is no *necessity* for *punishment*, as that is a right of God, whence the prevention of it by the existence of any doubt,) and therefore, if a dumb person verify the report of a slanderer, still he is not liable to punishment,—neither is punishment inflicted upon him if he himself slander another by signs, because the slander is not *express*, which is the condition of its being punishable.—The difference between punishment and retaliation is, that the former is not

\* Arab. *Moos't been Marfoom*. It is a technical term, applied to all regular deeds, contracts, &c.

† Arab. *Moos't been Ghayr Marfoom*. This is the same term, only with the addition of the privative *Ghayr*.

‡ Arab. *Ghayr Moos't been*.

§ See Vol. II. p. 368.

established by *doubtful* evidence, whereas the latter is so;—for if witnesses charge a particular person with “*illegal carnal connection*,” or a person make confession of “*illegal carnal connection*,” still punishment is not to be inflicted; whereas if witnesses testify to “*a murder*” in general terms, or a person make a confession of “*a murder*,” retaliation is inflicted, although the term “*wilful*” should not have been expressly mentioned.—The ground of this is that retaliation possesses the character of *reciprocity*, as having been ordained for the reparation of injuries; and it is therefore admitted to be established notwithstanding a doubt, in the same manner as all other matters of reciprocity which concern the rights of the individual.—With respect, on the contrary, to such punishments as are inflicted purely in right of God, they have been ordained for the purpose of determent; and as that does not bear the character of reciprocity, punishment, as not being a matter of necessity, is not established under any circumstance of doubt.—*Mohammed*, in treating of *ACKNOWLEDGMENTS*\*, says “the writing of an absentee is not cognizable as proof, with respect to retaliation;”—(in other words, if an absentee send a written acknowledgment, inducing retaliation upon himself, such acknowledgment is not cognizable.) Our author remarks, upon this passage, that it may be taken in two ways. *FIRST*, by the absentee may be meant *any* absentee, whether dumb or otherwise; and on this construction the point admits of two determinations; the one, what is here mentioned; and the other, what has been before recited. *SECONDLY*, by the absentee may be meant a person who is *not* dumb;—as if he [*Mohammed*] had said, “the writing of an absentee, *not being dumb*, is not cognizable as proof with respect to retaliation, since, having the power of speech, it is possible that he may himself appear, and make an express confession by word of mouth;—an expectation which cannot be entertained with respect to a *dumb* person, since it is impossible that such

\* Probably in the *Mabsoot*.

“person should speak, so as to make an express oral confession.”—Some of our doctors entertain an apprehension that the signs of a dumb person, who is at the same time able to write, are cognizable; because signs are admitted as proof purely from necessity, which does not exist in this instance.—This apprehension, however, is repugnant to what has been before mentioned, as from *that* we are to infer that the signs of a dumb person are cognizable, notwithstanding he be capable of writing; for as it is there said that “if a dumb person make signs, or write, it is valid,” it follows that signs and writings are of equal weight, and that either of them suffices;—the reason of which is that signs and writings are, both of them, admitted as proofs purely from necessity; and as, on the one hand, writing possesses an explicitness of which signs are destitute (the design or meaning of the person being ascertained indubitably from what he writes,) whereas signs are of an ambiguous nature, so, on the other hand, signs possess an explicitness of which writings are destitute, as they approach still nearer to speech;—and signs and writings are therefore upon an equal footing.

THE writing of a person who has been deprived of the use of speech by any accident, for two or three days, is not cognizable, any more than that of an absentee who is not dumb, since there is still room to hope that he may be able to speak, as his organs of speech remain.

Case of  
slaughtered  
carcasses be-

IF the carcasses of slaughtered\* goats be promiscuously mixed with those of carrion† goats, and the one be not known from the other,

\* Arab. *Maxbooh*, meaning those regularly slain according to the prescribed form of *Zabbah*. (See Vol. IV. p. 62.)

† Arab. *Moordâr*, meaning those which have died a natural death, or have not been slain according to the prescribed form.

and

and the number slaughtered exceed the number of carrion, the persons about to use them must make a deliberate selection, and eat such only as they suppose most likely to have been lawfully slain.—But if the number of carrion exceed the number slaughtered, or if they be equal in number, none of them must be used.—What is here advanced applies solely to a situation which admits a latitude of choice; for in a situation of necessity the selection may be made under either circumstance, and those used which the people suppose most likely to have been lawfully slain; because as, in time of want, indubitable carrion is allowed to be lawful, it follows that what comes within the possibility of having been duly slain is lawful *a fortiori*; but still a deliberate selection must be made, since it is most likely that by this means those will be used which have been duly slain; and the selection is therefore not to be dispensed with except in cases of extreme urgency. *Shafei* maintains that, in a situation which admits a latitude of choice, it is not lawful to eat any of the goats, notwithstanding the number of those duly slain exceed the number of the carrion; for as the selection is an argument of necessity, it is not to be practised except in a case of necessity, which does not apply to a situation admitting a latitude of choice. The argument of our doctors is, that the circumstance of the slain goats exceeding the carrion in number is equivalent to necessity, whence the eating of some of them is lawful after a due selection;—in the same manner as it is lawful to take and use articles sold in a *Mussulman* market, because of the greater number of commodities there exhibited being lawful, notwithstanding a market be not altogether free from certain prohibited articles, such as *stolen* or *usurped* goods, and the like; the ground of which is, that as it is not always possible to make a distinction with respect to *small* matters, a regard to them is remitted, since otherwise the business of life could not be carried on; and accordingly, a small degree of dirt, or of nakedness, in prayer, is not of any moment. In a case, therefore, where the number of slaughtered goats exceeds that of the carrion, the

ing promiscuously mixed with carrion.



## MISCELLANEOUS CASES.

the eating of some of them is allowed, from a species of necessity. It is otherwise where the number of the carrion exceeds or equals that of the slain; for in this case, supposing the situation to be such as admits a latitude of option, no necessity whatever exists.

THE END.

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## ERRATA in the FOURTH VOLUME.

Page 37, line 23, *for* maintaining, *r.* maintains.

76, — 2, — *Eed*, *r.* *Yd*.

116, — 11, — dependances, *r.* dependancies.

219, — 14, — confider, *r.* confidered.

244, — 8, — on, *r.* in.

403, — 2, (note,) *for version*, *r.* *text*.

505, — 4, *for ingenders*, *r.* *engenders*.

548, — 14, — existence, *r.* affistance.











